8-16-1976

Robert D. Sykes v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0362

APPELLANT'S BRIEF

553 SW 2d 44

SUPREME COURT OF KENTUCKY

FILE NO. 76-362

ROBERT D. SYKES — APPELLANT

VS. — APPEAL FROM FLOYD CIRCUIT COURT
HON. HOLLIE CONLEY, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

4344

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief for Appellant has been mailed to the Hon. Hollie Conley, Judge, Floyd Circuit Court, Floyd County Courthouse, Prestonsburg, Kentucky 41653; Hon. John Paul Runyon, Commonwealth Attorney, 35th Judicial District, Pikeville, Kentucky 41501; Hon. James R. Allen, Commonwealth Attorney, 31st Judicial District, Prestonsburg, Kentucky 41653; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 16th day of August, 1976.

Larry H. Marshall

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* * * * * * * * * * * * * * * * * * *

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY DENYING APPELLANT THE COMPULSORY PROCESS OF OBTAINING MATERIAL WITNESSES, LOCATED IN FEDERAL PRISON, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE KENTUCKY AND U.S. CONSTITUTIONS?

II.

WAS THE TRIAL COURT'S REFUSAL TO APPOINT ALTERNATIVE COUNSEL WHEN APPELLANT OBJECTED TO BEING REPRESENTED BY COURT-APPOINTED ATTORNEYS AND REQUESTED APPOINTMENT OF ALTERNATIVE COUNSEL A DENIAL OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL?

III.

DID THE TRIAL COURT'S FAILURE TO GRANT, SUA SPONTE, A CONTINUANCE WHEN APPELLANT'S CHIEF COUNSEL FAILED TO APPEAR, AND WHEN APPELLANT EXPRESSED DISSATISFACTION WITH HIS COURT-APPOINTED ATTORNEYS CONSTITUTE AN ABUSE OF DISCRETION WHICH VIOLATED APPELLANT'S CONSTITUTIONAL GUARANTEE OF DUE PROCESS?

IV.

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DID THE CUMULATIVE EFFECT OF THE PRECEDING TEN ERRORS SUBSTANTIALLY PREJUDICE APPELLANT'S TRIAL AND DEPRIVE HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL?

STATEMENT OF THE CASE

On July 7, 1972, Appellant was jointly indicted with Boone Deskins, William Eugene Thompson, and Willard "Woody" Christian in the Pike Circuit Court for the offense of willful murder in violation of KRS 435.010 (Transcript of Record; hereinafter T.R., pp. 1-2). The indictment alleged that Appellant, on July 7, 1972, aided, abetted and conspired with the above-named coindictees in murdering Gladys Deskins by stabbing her and shooting her with a shotgun (Id.). Although the indictment alleged that the crime was committed on or about July 7, 1972, it is clear that the crime was committed on July 11 and 12, 1971.

On July 17, 1972, Appellant waived formal arraignment and entered a plea of not guilty (T.R., Vol. I, p. 9). Also on this date, the trial of Appellant's case was continued for the first of many times to the October term of court (Id). After the Commonwealth elected to try Boone Deskins first, the court, on January 26, 1973, reassigned the trial of Appellant's case to March 5, 1973 (T.R., Vol. I, p. 13). Appellant's trial was continued again after the Commonwealth elected to try Eugene Thompson (T.R., Vol. I, p. 28).

On October 12, 1973, Appellant moved the trial court to permit his attorney of record, Fred B. Redwine, to withdraw (T.R., Vol. I, pp. 29-30). This motion was sustained on December 4, 1973 (Id.). The trial court then appointed Gary Johnson as attorney for Appellant (Id.). Appellant then moved to dismiss Gary Johnson as counsel of record on December 20, 1973 (T.R., Vol. I, pp. 36-37). Although the trial judge, on February 27, 1974, overruled this motion to relieve Mr. Johnson, the trial judge also appointed Lee Leford as co-counsel with Mr. Johnson as attorneys of record (T.R., Vol. I, p. 78).

On March 14, 1974, Appellant moved for a change of venue "from Pike County to another suitable neighboring county" (T.R., Vol. I, pp. 93-94).

Then on March 25, 1974, the trial court overruled Appellant's pro se motion to dismiss the indictment because he had been denied a speedy trial (T.R., Vol. I, p. 104).

Appellant on May 28, 1974, renewed his motion for a change of venue, and in support of the motion, he filed the affidavits of fifty-four persons (T.R., Vol. I, pp. 113-114). After making findings of fact, the Pike Circuit Judge, on June 28, 1974, transferred the trial of Appellant's case to the Floyd Circuit Court (T.R., Vol. II, pp. 172-177).

On September 10, 1974, Appellant moved for a continuance to enable him sufficient time to arrange for the attendance at trial of his witnesses located in federal prison (T.R., Vol. II, p. 179). At this point, it was also apparent that Dan Rowland was appointed to assist in the defense of Appellant (T.R., Vol. II, p. 180).

On October 31, 1974, Appellant moved for the production of witnesses (T.R., Vol. II, pp. 192-194). In addition, Appellant's trial counsel moved the trial court to conduct a closed hearing on the materiality and relevancy of Appellant's proposed witnesses (T.R., Vol. II, p. 194). It was pursuant to this request that the trial judge ordered a hearing to be held, and further ordered that the representatives of the Commonwealth would be excluded from said hearing (T.R., Vol. II, p. 195). After the hearing was held and the transcript of the record was sealed, the trial judge, on November 1, 1974, ordered the Commonwealth to produce at trial all but four of the persons named by Appellant as witnesses (T.R., Vol. II, pp. 197-201).

However, on December 13, 1974, the Commonwealth's Attorney moved to amend the order directing that the Commonwealth produce witnesses on behalf of Appellant (T.R., Vol. II, pp. 202-204). As grounds for the motion, the prosecution stated the unimaginative reasons of threat of escape by the federal prisoners and the cost of their production (Id.). At a hearing held on December 20, 1974, the trial judge ordered that the testimony of these federal prisoners be taken by depositions (T.R., Vol. II, pp. 206-207). Appellant, however, refused to permit the deposing of his witnesses (T.R., Vol. II, p. 211).

On May 2, 1975, Appellant again moved to dismiss the indictment because he was denied a speedy trial (T.R., Vol. II, pp. 235-236). The trial judge, on May 29 and June 2, 1975, held a hearing to consider the various motions of Appellant (Transcript of Hearing on Various Motions, hereinafter T.H.V.M., pp. 1-65). At this hearing, the trial judge overruled Appellant's motion to set aside the order for taking depositions of Appellant's witnesses (T.H.V.M., p. 32).

Apparently, the trial judge scheduled a hearing on September 19, 1975, to set the ground rules for the trial of Appellant's case which was to begin on September 22, 1975 (Transcript of Evidence, hereinafter T.E., Vol. I, pp. 4-5). However, Lee Ledford, "the attorney that [Appellant] wanted to represent him," failed to appear (T.E., Vol. I, p. 4), and on September 21, 1975, Mr. Ledford informed the court that he was withdrawing from the case (T.E., Vol. I, p. 6).

The trial of Appellant's case finally began on September 22, 1975, over three years after the indictment was returned against Appellant. However, before the proceeding began Appellant moved to dismiss both Gary Johnson and Dan Rowland (T.E., Vol. I, p. 9; T.R., Vol. III, pp. 320-322). Appellant

did not wish to represent himself, but rather, Appellant wanted the court to appoint another attorney to represent him. (T.E., Vol. I, p. 12). The court, however, directed the two assigned attorneys to proceed with the case (T.E. Vol. I, p. 11).

At the trial held on September 22-24, 1975, the prosecution attempted to produce enough evidence to corroborate the testimony of the accomplice, Woody Christian, that Appellant drove the car in the murder for hire escapade.

Woody Christian, the person jointly indicted with Appellant for the charged offense (T.R., Vol. I, p. 2), testified that Boone Deskins first approached him to murder Deskins' wife, Gladys, around the "last part of June" (T.E., Vol. II, p. 261). Shortly thereafter, Christian stated that he mentioned the murder offer to Appellant (T.E., Vol. II, p. 262), and they proceeded to enlist the aid of Eugene Thompson (T.E., Vol. II, p. 237). According to the further testimony of Christian; he, Appellant, and Thompson left for Gladys Deskins' house around 10:00 p.m. on Sunday, July 11, 1971 (T.E., Vol. II, p. 251), with Appellant driving the car (T.E., Vol. II, p. 238). Christian testified that Appellant let he and Thompson out near the Johns Creek High School (T.E., Vol. II, p. 241), and the two then proceeded the rest of the way to Mrs. Deskins' house on foot (T.E., Vol. II, p. 242). After Mrs. Deskins turned out her lights, Christian and Thompson made their move. Christian testified that he stayed by the barrel beside the railroad tracks while Thompson entered the house (T.E., Vol. II, p. 280). However, Christian testified that he left when Thompson began "making all kinds of noise" (T.E., Vol. II, p. 243), and he heard a shotgun blast as he was crossing the creek (T.E., Vol. II, p. 243). Christian then testified that when Appellant picked the two back up (T.E., Vol. II, p. 252);

Appellant stated that he went to the Pizza Inn to establish an alibi (T.E., Vol. II, p. 241). Finally, Christian testified that he was paid $6,900.00 for the murder which he divided with Appellant and Thompson (T.E., Vol. II, pp. 239-240).

To corroborate this testimony, all the prosecution had was that Appellant was seen with Thompson and Christian on Sunday night, and statements that Appellant allegedly made in reference to the death of Gladys Deskins.

During the trial, the prosecution was allowed to improperly impeach two witnesses by the use of prior inconsistent statements. In each instance, the prosecution failed to lay a proper foundation for the impeachment, and in the case of Sandra Thompson, the prosecution was impeaching its own witness. Also the trial court failed to permit Appellant to rehabilitate the credibility of Eugene Thompson when the prosecution continually told the jury that Eugene Thompson had nothing to lose, and that he was trying to bail Appellant out by his testimony (T.E., Vol. III, p. 446).

Also the prosecution introduced five inflammatory and prejudicial photographs of the victim. Further, the prosecution during its closing argument made prejudicial comment which prejudiced Appellant's right to a fair trial.

Appellant did not take the stand in his own defense, but asserted a defense of alibi. The testimony introduced on his behalf was that he and his brother were on their way to buy a used car when the murder of Mrs. Deskins was taking place. Appellant's brother, Eugene Sykes, testified that he and Appellant left for Detroit on Sunday, July 11, 1971, "between 12:30 and 1:00" a.m. (T.E., Vol. II, p. 454), and that Appellant bought a car on Monday morning (T.E., Vol. III, p. 456).

Also Eugene Thompson, who was convicted for Gladys Deskins' murder, testified for Appellant. He specifically stated that Appellant did not take he and Christian over to the victim's house and let them out (T.E., Vol. III, p. 439).

Contrary to his plea, Appellant, on September 24, 1975, was found guilty of the charged offense (T.R., Vol. III, p. 326). Judgment was entered on September 30, 1975, sentencing Appellant to life (T.R., Vol. III, pp. 329-330).

On this same day, Appellant filed his Motion and Grounds for a New Trial (T.R., Vol. III, pp. 327-328). Said Motion was overruled on October 6, 1975 (T.R., Vol. III, p. 331).

On this same day, Appellant filed his Notice of Appeal (T.R., Vol. III, p. 332).

Other facts which are material and necessary for the determination of this case will be set forth in the arguments.

ARGUMENTS

I.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY DENYING APPELLANT THE COMPULSORY PROCESS OF OBTAINING MATERIAL WITNESSES, LOCATED IN FEDERAL PRISON, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE KENTUCKY AND U. S. CONSTITUTION.

On October 31, 1974, Appellant moved for the production of witnesses with the expense for their production to be borne by the Commonwealth (T.R., Vol. II, pp. 192-194). The list of Appellant's proposed witnesses included the names of Thomas Sheppard, Julius Blankenship, Tony Mullins, Lee Brooks, Charles Stafford, and James Daulton (T.R., Vol. II, p. 192). The above-named persons were all prisoners, confined in federal penal institutions. In addition to the request for the production of these witnesses, Appellant's trial counsel moved the trial court to conduct a closed hearing on the "materiality and relevancy of the evidence of the within named witnesses" (T.R., Vol. II, p. 194).

It was pursuant to this request that the trial judge, on October 31, 1974, ordered a hearing to be held, and further ordered that the representatives of the Commonwealth would be excluded from said hearing (T.R., Vol. II, p. 195). The expressed purpose of this hearing was to inquire into "the materiality and relevancy of the evidence to be given by the proposed witnesses" so that a determination could be made into the necessity of subpoenaing those witnesses in federal custody (Id.).

On November 1, 1974, the hearing was held on Appellant's motion for the production of witnesses at the expense of the Commonwealth (T.R., Vol. II, pp. 197-201). From the evidence introduced at the hearing, the trial court, on November 20, 1974, specifically ordered the Commonwealth to

produce those witnesses presently incarcerated in federal prison - i.e., Lee Brooks, Thomas Sheppard, Charles Stafford, James Daulton, Julius Blankenship and Tony Mullins - at Appellant's trial (T.R., Vol. II, pp. 200-201).

However, on December 13, 1974, the Commonwealth's Attorney moved to amend the order directing the Commonwealth to produce the six witnesses confined in federal prison at Appellant's trial (T.R., Vol. II, pp. 202-204). As grounds for this motion, the prosecution stated that enormous cost would be involved in the witnesses's production; that these prisoners would create a substantial security problem in Floyd County; that although it "has no conception of the evidence to be offered" by these witnesses, "it does not believe" that the testimony of these witnesses can be of material benefit to the defendant (Id.).

At a hearing held on December 20, 1974, the trial judge ordered that the testimony of the witnesses confined at Atlanta in federal custody - i.e., Thomas Sheppard, Charles Stafford, and Julius Blankenship - be taken by depositions on January 13, 1975 (T.R., Vol. II. pp. 206-207). Pursuant to Appellant's motion to postpone the taking of deposition until February 3, 1975 (T.R., Vol. II, p. 204), the trial court sustained said motion on January 1, 1975 (T.R., Vol. II, p. 209.

But on February 3, 1975, Appellant refused to permit the deposing of the three federal prisoners located in Atlanta (T.R., Vol. II, pp. 210-212). Rather, Appellant wanted the three witnesses to give their testimony in open court.

Then on March 28, 1975, the prosecution moved the trial court for an order permitting it to take by depositions

at Terre Houte, Indiana, the testimony of the other federal prisoners (T.R., Vol. II, pp. 219-220). These prisoners - i.e., Tony Mullins, Lee Brooks, and James Daulton - were originally ordered to be produced at Appellant's trial by the trial judge (T.R., Vol. II, p. 200). Again, the Commonwealth stated as its reason for their non-production the fact that the United States Marshals do not have sufficient personnel available to transport the prisoners (T.R., Vol. II, pp. 219-220). The trial court, on April 16, 1975, ordered that the depositions of Brooks and Daulton be taken by video tape (T.R., Vol. II, pp. 230-231).

On May 7, 1975, Appellant moved to set aside the orders allowing the prosecution to take the deposition of Brooks and Daulton (T.R., Vol. II, pp. 247-251). In his motion, Appellant stated that the very reason the trial judge ordered the record of the hearing sealed was to prevent the Commonwealth from determining the testimony of Appellant's witnesses therefore, to now allow the Commonwealth to hear and cross-examine Appellant's witnesses would inherently prejudice Appellant's right to a fair trial (T.R., Vol. II, p. 248).

At the proceedings, held in Indiana on May 9, 1975, to take the "oral depositions" of Brooks and Daulton, both prisoners failed to appear (T.R., Vol. II, pp. 267-270). Again, Appellant demanded that his witnesses appear in open court (T.R., Vol. II, p. 269).

The trial judge, on May 29 and June 2, 1975, held a hearing to consider the various motions of Appellant (T.H.V.M., pp. 1-65). One of the motions facing the court was that of compulsory process of obtaining witnesses located in federal prison. Again Appellant's trial counsel informed the court

of its earlier determination that these witnesses were important and essential to Appellant's defense (T.H.V.M., p. 15). Appellant's counsel then informed the trial judge that he would be moving the federal court for writ of habeas corpus ad testificandum (T.H.V.M., p. 48), because Sheppard, Stafford, Brooks, Dalton and Blankenship were essential to Appellant's defense (T.H.V.M., p. 50). The trial judge at that point stated that he was going to give the defense "an opportunity to go to Federal Court to . . . see if they will require you [the prosecution] to produce those prisoners here to testify in person" (T.H.V.M., p. 58).

On August 2, 1975, Appellant moved the Floyd Circuit Court for writs of habeas corpus ad testificandum for Brooks, Sheppard, Stafford, Daulton and Blankenship (T.R., Vol. II. pp. 280-281). However, the trial court denied the motion on August 15, 1975 (T.R., Vol. II, pp. 295-296). The trial court based its decision on the expense involved, the threat of escape, and the use of depositions (Id.).

Finally, Appellant, on the day of trial, reiterated that by denying him the right of his witnesses located in federal prison, the lower court was denying him the compulsory process of obtaining witnesses in his behalf (T.E., Vol. I. p. 11).

In all criminal prosecutions, the Kentucky Constitution guarantees the right of the accused "to have compulsory process for obtaining witnesses in his favor." Kentucky Constitution, Eleventh Amendment. This right to present witnesses in one's own behalf is a cornerstone of fundamental fairness ensured by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). As noted by the Supreme Court in Chambers v. Mississippi, 410 U.S. 284,

93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), "Few rights are more fundamental than that of an accused to present witnesses in his own defense."

Compulsory process, then, is an essential component of due process. As the Supreme Court stated in Washington, supra:

> The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. . . .
>
> . . . .
>
> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. Id., 87 S.Ct. at 1923. [My emphasis added].

In the case at bar, Appellant moved the trial court for the production of six witnesses located in federal prison to be used by Appellant at his trial (T.R., Vol. II, pp. 192-194). To show that the request for these six persons was not frivolous, but rather, that these witnesses were material to Appellant's defense, Appellant's trial counsel suggested that the trial court hold a hearing "on the materiality and relevancy of evidence" of the witnesses (T.R., Vol. II, p. 194). During this sealed hearing, in which the prosecution was not allowed to participate, Appellant demonstrated sufficient reasons to the lower court why the production of the witnesses was material and necessary to Appellant's defense. This is readily apparent because the lower court, from the evidence introduced at the

hearing, specifically ordered the Commonwealth to produce those witnesses.presently incarcerated in federal prison (T.R., Vol. II, pp. 200-201).

But in an effort to keep its upperhand over Appellant, and find out what the proposed testimony of these witnesses was going to be, the prosecution moved to amend the order for the production of these federal prisoners (T.R., Vol. II, pp. 202-204). As grounds for the motion, the prosecution stated that though it "has no conception of the evidence to be offered" by these federal prisoners, "it does not believe" this testimony will be of material benefit to Appellant (T.R., Vol. II, p. 204).

In United States v. Hathcock, 441 F.2d 197 (5th Cir. 1971), the Fifth Circuit Court of Appeals was faced with a factual situation similar to the case at bar. In the cited case, defense counsel petitioned the district court for a writ of habeas corpus ad testificandum for production of Haynes who was in the federal penitentiary at Leavenworth. After the district judge found out the materiality of Haynes' proposed testimony, the judge stated that he would grant the writ if defense counsel assured the court that Haynes would be used as a witness. Reversing the conviction due to the district court's failure to grant the writ, the court also stated:

> . . .[I]f the accused avers facts which, if true, would be relevant to any issue in the case, the requests for subpoenas must be granted, unless the averments are inherently incredible on their face, or unless the Government shows, either by introducing evidence or from matters already of record, that the averments are untrue or that the request is otherwise frivolous. Id., at pp. 199-200. [My emphasis added].

In the case sub judice, the Commonwealth only stated that it "does not believe" that their testimony was material.

This was not sufficient. Therefore, when the lower court found that these witnesses were material to Appellant's defense, the lower court should have granted the writs of habeas corpus ad testificandum.

It is recognized that an accused is entitled to compulsory process to compel the attendance of material witnesses located in federal prison. 28 U.S.C. § 2241(c)(5).

In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), the Supreme Court stated:

> . . . [I]n the case of a prospective witness currently in federal custody, 28 U.S.C. § 2241(c)(5) gives federal courts the power to issue writs of habeas corpus ad testificandum at the request of state prosecutorial authorities. . . In addition, it is the policy of the United States Bureau of Prisons to permit federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus ad testificandum issued out of state courts. . . Id., 88 S.Ct. at 1321.

Also in Curran v. United States, 332 F. Supp. 259 (D.Del. 1971), the district court noted:

> . . . Common sense would dictate that the preferred procedure would be for defense counsel to petition, not the federal District Court, but the State Court where the trial is to be held, for the issuance of the writ. . . Upon the issuance of such a writ by the proper state court and service thereof upon the Marshal. . . he will honor it as a matter of policy, obviously growing out of reasons of comity. . . Id., at 261. [My emphasis added].

In the case sub judice, Appellant petitioned the Floyd Circuit Court for writs of habeas corpus ad testificandum for Brooks, Sheppard, Stafford, Daulton and Blankenship (T.R., Vol. II, pp. 280-281). However, the trial court denied the motion for the production of these witnesses at trial, and in so doing stated, "[t]he law provides for other means of securing the testimony of these witnesses without [their]

being ordered brought to this court" (T.R., Vol. II, pp. 295-296).

Since it has been established that Appellant has a right to compulsory process and that those witnesses confined in federal prison were material and indispensable witnesses, Appellant submits that the order allowing the prosecution to take depositions of witnesses would deny him his Sixth Amendment right to compulsory process.

The Commonwealth advanced three reasons for the non-production of Appellant's witnesses incarcerated in federal prison. First, the Commonwealth argued the enormous cost involved in the production of these witnesses. But money is never an obstacle when it will deny an accused his right to a fair trial. Also the prosecution argued that the prisoners would create a substantial security problem. However, this could have easily been remedied by housing the prisoners at the various jails surrounding Floyd County. Finally, the Commonwealth argued that the United States Marshals did not have sufficient personnel available to transport the prisoners. It must be noted that there was nothing in the record from the federal marshals to substantiate this claim. But more importantly, upon the issuance of a writ of habeas corpus ad testificandum by the proper state court, the marshals "will honor it as a matter of policy." Curran, supra. Therefore, none of these reasons were sufficient to make these witnesses "unavailable" in the constitutional sense, and justify the use of depositions.

The only reason why the witnesses were not present to testify was because the state did not make a "good-faith" effort to seek their presence. In fact, the state made no effort to obtain the presence of these federal prisoners. Rather, the prosecution in an effort to keep its upperhand, and find out what the proposed testimony of these witnesses

was going to be, requested the use of the depositions. This amounted to nothing less than a concerted attempt to deprive Appellant of the benefit of his witnesses testimony.

The fact that the prosecutorial authorities made no "good-faith" attempt to obtain the presence at trial of these prisoners is readily apparent from the fact that the trial judge stated that he was going to give the defense "an opportunity to go to Federal Court. . . to see if they will require you [the prosecution] to produce those prisoners here to testify in person" (T.H.V.M., p. 58).

In Barber, supra, the Supreme Court was faced with a situation were the prosecution wanted to introduce the testimony of Woods taken at preliminary hearing because Woods, according to the prosecution, was unavailable. Woods at the time of trial was incarcerated in federal prison. Reversing the conviction, the Supreme Court stated:

> In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. . . In short, a witness is not "unavailable" . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. . . . Id., 88 S.Ct. at 1322 [My emphasis added].

The Supreme Court later expounded on this concept when it stated:

> The Uniform Act to secure the attendance of witnesses from without a State, the availability of federal writs of habeas corpus ad testificandum, and the established practice of the United States Bureau of Prisons to honor state writs of habeas corpus ad testificandum, all supported the Court's conclusion in Barber that the State had not met its obligations to make a good-faith effort to obtain the presence of the witness merely by showing that he was beyond the boundaries of the prosecuting State. . . Mancussiv. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972).

In the case sub judice, the prosecution did not make a good-faith effort to secure the presence of these witnesses located in federal prison. Since they were not "unavailable" in the constitutional sense, the use of depositions would not have satisfied Appellant's right to compulsory process.

Because the prosecution violated Appellant's right to compulsory process, it denied him the ability to produce relevant and material testimony for his defense. In fact, the failure to allow the presence of these federal prisoners denied Appellant the right to make a defense as we know it.

Accordingly, this Court must reverse Appellant's conviction since Appellant was denied his constitutional right of compulsory process to obtain witnesses.

II.

THE TRIAL COURT'S REFUSAL TO APPOINT ALTERNATIVE COUNSEL WHEN APPELLANT OBJECTED TO BEING REPRESENTED BY COURT-APPOINTED ATTORNEYS AND REQUESTED APPOINTMENT OF ALTERNATIVE COUNSEL WAS A DENIAL OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

On October 12, 1973, Appellant and his counsel, Fred B. Redwine, jointly moved the trial court to premit Mr. Redwine to withdraw as attorney of record for Appellant (T.R., Vol. I, pp. 29-30). In sustaining said motion on December 4, 1973, the trial court then appointed Gary Johnson as attorney of record for Appellant (T.R., Vol. I, p. 33).

However, Appellant, on December 20, 1973, moved to dismiss Gary Johnson as attorney of record (T.R., Vol. I, pp. 36-37). As grounds for this motion, Appellant stated that Mr. Johnson was not "a criminal lawyer" who could adequately handle his defense (Id.). Although the trial judge, on February 27, 1974, overruled Appellant's motion to relieve Mr. Johnson, the trial judge did appoint Lee Ledford of the Public Defender's Office at Harlan as co-counsel with Mr. Johnson as attorneys of record (T.R., Vol., p. 78).

By September 10, 1974, Dan Rowland had been appointed to assist the other co-counsels in the defense of Appellant (T.R., Vol. II, p. 180).

In a letter written to Mr. Johnson on September 18, 1974, Appellant expressed his open distrust for Mr. Johnson by stating that Mr. Johnson was appointed by the Commonwealth's Attorney; that Mr. Johnson was undermining the efforts of his attorney, Mr. Ledford; that Mr. Johnson's services could be dispensed with (T.R., Vol. II, p. 251).

On September 19, 1975, a hearing was held to set the ground rules for the trial of Appellant's case which was to begin on September 22, 1975 (T.E., Vol. pp. 4-5). However,

Lee Ledford, "the attorney that [appellant] wanted to represent him," failed to appear (T.E., Vol. p. 4), and on September 21, 1975, Mr. Ledford informed the court that he was withdrawing from the case (T.E., Vol. I, p. 6).

The trial of Appellant's case finally began on September 22, 1975. Before the proceeding began, however, Appellant moved to dismiss both Gary Johnson and Dan Rowland as his attorneys (T.E., Vol. I, p. 9; T.R., Vol. III, pp. 320-322). Appellant did not wish to represent himself (T.E., Vol. I, p. 8), but rather, Appellant wanted other "competent counsel to be appointed" for him (T.E., Vol. I, p. 12). The trial court overruled these motions, and directed the two appointed attorneys to "take any action they feel is necessary for this man's best interest" (T.E., Vol. I, p. 11).

It has long been recognized that included within the Sixth Amendment right to counsel is an ancillary theorem that an accused has a limited right to counsel of his own choice. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

In the landmark decision on conflict of interest of counsel, the Supreme Court in Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), made the following statement in regard to choosing one's counsel:

> ...[W]e have held that the right to assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment. . . . Id., 62 S.Ct. at 464-465. [My emphasis added].

Unquestionably, an indigent defendant in this Commonwealth who is not satisfied with his court-appointed attorney has the right to ask the trial court to appoint another attorney. See Short v. Commonwealth, Ky., 394 S.W.2d 937 (1965); Dupin v. Commonwealth, Ky., 408 S.W.2d 443 (1966). It immediately follows that where a defendant demonstrates good cause, the trial court is constitutionally required to appoint a substitute counsel. United States v. Calabro, 467 F.2d 973 (2nd Cir. 1972).

In a remarkedly similar factual circumstance, the court in Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970), held that the refusal of the accused to communicate with his attorney was a grave circumstance which required appointment of substitute counsel. In the cited case, the Ninth Circuit found that the refusal of the trial court to appoint substitute counsel was a denial of the accused's right to effective assistance of counsel. The court went on to state:

> . . .to compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever. . . .Id., at 1170.

Where there has occured a breakdown in the attorney-client relationship, the trial court must appoint substitute counsel. This principle was recognized in the ABA Standards Relating To Providing Defense Services. Standard 5.3 states:

> . . .If leave to withdraw is granted or if the defendant for substantial grounds asks that counsel be replaced, successor counsel should be ap pointed. . . .

The Commentary to this section states:

> ...It has been suggested that where a breakdown in the relation between attorney and client has occurred as the result of a misunderstanding between them it would be appropriate to relieve the lawyer of his appointment and appoint another lawyer. . . Since a relationship of mutual confidence between lawyer and client is important to the lawyer's fulfillment of his professional functions, where good cause is shown by the defendant why that confidence does not exist the court should substitute counsel. . . .

Appellant submits that the record demonstrates such a complete breakdown of the attorney-client relationship and that the failure to appoint substitute counsel was a denial of Appellant's Sixth Amendment right to counsel.

It was clear that Appellant did not want the services of either Mr. Johnson or Mr. Rowland. But rather, Appellant considered Mr. Ledford as his chief counsel. Also it was apparent to the trial court that there was a lack of confidence, lack of cooperation and lack of communication between Appelant and his court-appointed attorneys. As Mr. Rowland explained:

> ...Mr. Sykes has never conferred with me about the defense of his case without the presence of the other attorneys. Any time I conferred with Mr. Sykes he was completely dependent upon and followed the advise of Mr. Ledford. He did not consult me, he did not ask me to do anything in his behalf and all actions I have taken in his behalf have been against his will, and the only attorney that he has consented to or to divulge any defense to that I know of is Mr. Ledford. . . .(T.E., Vol. I, p. 28). [My emphasis added].

Just before the opening statement of the Commonwealth, Mr. Rowland was still informing the court that Appellant was not cooperating with his defense attorneys (T.E., Vol. I, p. 141).

Appellant also distrusted his two appointed attorneys. He believed the two were appointed by the Commonwealth's Attorney (T.R., Vol. III, p. 322), and that they revealed his defense to the prosecution (T.E., Vol. I, p. 10). The distrust and dissatisfication Appellant had for his court-appointed attorneys also stemmed from the fact that Appellant felt his attorneys had not assisted him properly in obtaining the presence at trial of his witnesses (T.R., Vol. I, p. 14).

However, when the trial court was informed of Appellant's dissatisfaction which his attorneys, and request for substitute counsel, the trial court denied the request without inquiring into the cause of Appellant's dissatisfaction. Upon a motion for substitution of counsel, the trial judge has a sua sponte obligation to investigate the merits of the request. People v. Wilson, 43 Mich. App. 459, 204 N.W.2d 269 (1972).

In Brown, supra, the Court was highly critical of the trial judge's summary disposition of the defendant's motion for substitution and suggested that a proper inquiry might have alleviated the problem:

> ...The state court summarily denied the motions, making no adequate inquiry into the cause of Brown's dissatisfaction with his counsel or taking any other steps which might possibly lead to the appointment of substitute counsel in whom Brown could repose his confidence. The result was that Brown was forced into a trial with the assistance of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not, in any manner whatsoever, communicate. Thus, the attorney was understandably deprived of the power to present any adequate defense in Brown's behalf. . . .

. . . .

> The problem arises because the state court did not, in our opinion, take the necessary time and conduct such necessary inquiry as might have eased Brown's dissatisfaction, distrust, and concern. . . . Id., at 1169-1170. [My emphasis added].

In the instant case, both Appellant and his court-appointed attorneys requested that they be allowed to withdraw. Appellant also requested that substitute counsel be appointed. The trial judge, however, refused to appoint substitute counsel, and forced Mr. Johnson and Mr. Rowland upon Appellant (T.E., Vol. I, p. 11).

In Faretta v. California, ____ U.S. _____, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Supreme Court observed:

> ...An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense. Id., 95 S.Ct. at 2534. [Emphasis in original].

Stated otherwise, where appointed counsel is unwillingly forced to defend and the accused is unwillingly forced to accept counsel, there is obviously no representation at all. "To force a lawyer on a defendant can only lead him to believe that the law contrives against him." Id., 95 S.Ct. at 2540.

In the case sub judice, the trial judge made no inquiry into the breakdown and total lack of confidence and distrust between Appellant and his court-appointed attorneys. The result was that Appellant was compelled to go to trial with attorneys who were forced upon him. The failure of the trial court to substitute counsel; therefore, denied Appellant his due process right to a fair trial.

For the reasons delineated above, Appellant respectfully request this Court to reverse his conviction.

III.

THE TRIAL COURT'S FAILURE TO GRANT, SUA SPONTE, A CONTINUANCE WHEN APPELLANT'S CHIEF COUNSEL FAILED TO APPEAR AND WHEN APPELLANT EXPRESSED DISSATISFACTION WITH HIS COURT-APPOINTED ATTORNEYS CONSTITUTED AN ABUSE OF DISCRETION WHICH VIOLATED APPELLANT'S CONSTITUTIONAL GUARANTEE OF DUE PROCESS.

As previously mentioned, the trial court, on February 27, 1974, appointed Lee Ledford of the Public Defender Office at Harlan as co-counsel with Gary Johnson as attorneys of record (T.R., Vol. I, p. 78). By September 10, 1974, Dan Rowland had also been appointed to assist in the representation of Appellant (T.R., Vol. II, p. 180).

Although, the three attorneys were appointed as co-counsel, it was early recognized that Appellant considered Mr. Ledford as the chief counsel. In fact, in a letter Appellant wrote to Mr. Johnson, Appellant considered Mr. Ledford as his only attorney (T.R., Vol. II, p. 251).

At a hearing held on September 19, 1975, to set the ground rules for the trial of Appellant's case, Lee Ledford, whom the court recognized as "the attorney that [Appellant] wanted to represent him," failed to appear (T.R., Vol. I, p. 4). Mr. Ledford informed the court, on September 21, 1975, that he was withdrawing from the case (T.E., Vol. I, p. 6).

At the schedule trial date, Appellant moved to dismiss both Dan Rowland and Gary Johnson as his attorneys (T.E., Vol. I, p. 9). Appellant did not want to represent himself (T.E., Vol. I, p. 8), but rather, Appellant wanted the trial court to appoint substitute counsel for him (T.E., Vol. I, p. 12). Although Appellant had expressed his dissatisfaction with his two court-appointed attorneys [See Argument II, infra], the trial court, nevertheless, forced the two attorneys upon Appellant (T.E., Vol. I, p. 11).

Finally, Appellant once again brought to the trial court's attention that his chief counsel was not present, and that he, therefore, wished other "competent counsel" appointed (T.E., Vol. I, p. 141). However, the trial judge, in denying the motion, stated, "Overrule his motion to continue the case" (T.E., Vol. II, p. 142).

Appellant submits that the failure of the trial court to grant, sua sponte, a continuance when his chief counsel failed to appear at trial, and when Appellant demonstrated his dissatisfaction with the court-appointed attorneys constituted a denial of due process which substantially prejudiced Appellant's right to a fair trial.

In Kentucky, as in most jurisdictions, it is well settled that granting a continuance is in large measure within the discretion of the trial court. However, "where it appears to the appellate court that in overruling the motion there was an abuse of judicial discretion, the judgment will be reversed in the interests of fairness and justice." Brashear v. Commonwealth, Ky., 328 S.W.2d 418, 419 (1959). "Under some circumstances, however, the facts may be so plain and demanding that a denial of a continuance will be deemed to be an abuse of discretion or be deemed to deny the accused substantial justice." 17 Am.Jr.2d, Continuance §36, citing Wilson v. Commonwealth, 134 Ky. 669, 121 S.W.614 (1909).

While the United States Supreme Court has recognized that the decision to grant or deny a continuance is within the discretion of the trial judge, that Court has recognized that a denial of a continuance in certain circumstances may violate the constitutional guarantee of due process.

In Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964), the Supreme Court explained:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . . Id., 84 S.Ct. at 849-850.

In the case at bar, the facts show that Appellant's chief counsel failed to appear on the day of trial. Also Appellant was forced to go to trial with two court-appointed attorneys that Appellant did not "trust." Under these circumstances, the trial judge, sua sponte, should have granted a continuance.

It must be noted at this point that this assignment of error is not inconsistent with Appellant's claim that his conviction must be reversed because he was denied a speedy trial [See Argument IV, supra]. Since it had been over three years between indictment and trial, Appellant had already been denied his right to a speedy trial when the circumstances justifying a continuance arose.

Appellant submits that the trial judge's failure to grant, sua sponte, a continuance constituted an abuse of discretion which denied Appellant due process of law.

On the basis of this error, Appellant's conviction must be reversed.

IV.

THE APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHERE THE DELAY BETWEEN INDICTMENT AND TRIAL WAS OVER THREE YEARS.

As previously explained, Appellant was indicted on the charged offense on July 7, 1972 (T.R., Vol. I, pp. 1-2). At the arraignment, held on July 17, 1972, Appellant pleaded not guilty, and the case was continued to the October term of the court (T.R., Vol. I, p. 9). Also Appellant, on July 26, 1972, moved the trial court to assign the case for trial for a day certain during the month of October, 1972 (T.R., Vol. I, p. 10).

However, pursuant to a motion by the Commonwealth to continue the case, the trial court, on October 9, 1972, ordered the case continued to the January term of the court (T.R., Vol. I, p. 12). No reason was given for this continuance. After the Commonwealth elected to try Boone Deskins, Appellant's coindictee, the court on January 26, 1973, ordered the continuance of Appellant's case and reassigned the trial to March 5, 1973 (T.R., Vol. I, p. 13). Then on April 6, 1973, the trial judge ordered the trial set for June 25, 1973 (T.R., Vol. I, p. 17), but on April 24, 1973, the trial was then reassigned to June 11, 1973 (T.R., Vol. I, p. 18).

On January 14, 1974, Appellant's case was continued to the March term of the court (T.R., Vol. I, p. 39). Again, no reason was given for the continuance. Then on April 25, 1974, the trial court overruled Appellant's pro se motion to dismiss the indictment on the grounds that he had been denied a speedy trial (T.R., Vol. I, pp. 104-105).

Appellant's trial counsel, on September 10, 1974, then moved for a continuance, and as grounds stated that since Appellant was incarcerated in federal prison, he had not been

available to participate with counsel in the preparation of his case (T.R., Vol. II, p. 179). In addition, defense counsel moved that Appellant's case which was scheduled for trial on September 23, 1974, be set for the November term of court (T.R., Vol. II, p. 180). On September 24, 1974, the trial judge sustained the continuance, and set trial for November 11, 1974 (T.R., Vol. II, p. 184).

The trial was then reset to April 14, 1975. However, the Commonwealth's Attorney, on March 28, 1975, moved the lower court for a continuance (T.R., Vol. II, p. 219). As grounds for this motion, the prosecution stated that it would be impossible to arrange for the attendence of witnesses, who were incarcerated in federal prison, and who were to testify in Appellant's behalf (T.R., Vol. II, p. 219). On April 7, 1975, the trial court sustained the Commonwealth's motion for a continuance (T.R., Vol. II, p. 229).

Once again the Appellant, on May 2, 1975, and June 2, 1975, moved the trial court to dismiss the indictment because he had been denied a speedy trial (T.R., Vol. II, pp. 235-236; 278a-278b). As grounds for the motion, Appellant stated that the "delay of the Commonwealth [had] caused the absence of at least two witnesses material to [him]" and that the delay unduly prejudiced his ability to defend the charges against him (Id.).

On June 2, 1975, a hearing was held on Appellant's motion to dismiss for lack of a speedy trial (T.H.V.M., pp. 42-65). During the hearing, Appellant's trial counsel stated that since the prosecution had not made a good faith effort to produce the witnesses incarcerated in federal prison, who were essential to Appellant's defense, defense counsel would go before federal court to get that court to order the witnesses

produced (T.H.V.M., p. 48). Although under both statutory and case law it is incumbent upon the prosecutorial authorities to obtain the attendence at trial of witnesses incarcerated in federal prison [See, Argument I, infra], the trial court granted a continuance to enable defense counsel to go before federal court (T.H.V.M., p. 55). The trial was then scheduled for September 22, 1975 (T.R., Vol. II, p. 279).

At the trial, the motion to dismiss for lack of a speedy trial was renewed (T.E., Vol. I, p. 25). Again Appellant reiterated that during the delay his material witnesses had either "left or died" (Id.). The failure to grant Appellant a speedy trial was also a ground relied upon by Appellant in his motion for a new trial (T.R., Vol. III, p. 328).

Finally, on September 24, 1975, more than three years after Appellant was indicted for the charged offense, Appellant was convicted for willful murder (T.R., Vol. III, p. 326).

The Supreme Court has consistently held that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." Klopfer v. North Carolina, 386 U.S. 213, 86 S.Ct. 988, 993, 18 L.Ed.2d 1 (1967).

In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Supreme Court determined that each case concerning denial of a right to a speedy trial must be decided on an ad hoc basis, taking into consideration these four factors: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. Id., 92 S.Ct. at 2192.

Following the analytic procedure recommended by the Supreme Court, Appellant will consider each factor as it applies to the case sub judice.

(1) Length of Delay

As noted in Barker, supra, the length of delay is to some extent a triggering mechanism. A lengthy delay between indictment and trial is the initial factor which prompts further inquiry into the other considerations delineated by the Supreme Court in Barker. While no precise time limit has been set, several cases have indicated certain limits beyond which a prima facie case of denial of a speedy trial will be established. In Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972) the court held that a delay of almost two years between indictment and trial was suffidient to require serious consideration of Appellant's claim. The District of Columbia Circuit has held that a delay of over one year raises a prima facie claim of denial of the right to a speedy trial. United States v. Calloway, 505 F.2d 311 (D.C. Cir. 1974). In Strunk v. United States, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973), there was a delay of only ten months in bringing the defendant to trial, yet the Supreme Court upheld the decision of the federal appellate court that the defendant's right to a speedy trial had been abridged.

In the instant case, the delay between indictment and trial was over three years; certainly well within the guidelines informally established in numerous jurisdictions to support Appellant's claim and warrant further consideration of the other factors.

(2) Reason for the Delay

As has been previously mentioned, Appellant's case has continued usually without any reasons having been advanced by the trial court or prosecution. When the Commonwealth did state reasons that the delay, the prosecution relied on the boilerplate reasons that the delay was necessary to obtain the presence at trial of Appellant's witnesses located in federal prison or that the prosecution was busy trying the other coindictees.

However, these are not valid reasons for the delay. The prosecution did not make a "good-faith" effort to bring either Appellant to trial, or to secure the attendance at trial of his witnesses. In fact, it was Appellant who was charged with a continuance to enable him to secure the attendance of his witnesses. This led Appellant to view the actions of the prosecution as amounting to a concerted attempt to deny him a fair trial.

In Barker, supra, the Supreme Court noted:

> . . . A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government....Id., 92 S.Ct. at 2192.

Furthermore, in Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970), the Supreme Court held:

> . . . the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial. . . . Id., 90 S.Ct. at 1569.

Since the Commonwealth failed to provide any legally sufficient reason for the delay, Appellant's contention that he was denied his right to a speedy trial stands uncontroverted.

(3) Defendant's Assertion of His Right

Traditionally, this Court has relied upon the "demand-waiver" doctrine in deciding the issue of denial of a speedy trial. LaVigne v. Commonwealth, Ky., 398 S.W.2d 691 (1966). This doctrine provides that a defendant waives any consideration of his right to a speedy trial for any period prior to which he has not demanded trial. However, this doctrine has not met with approval from the Supreme Court since the accused has no duty to bring on his trial.

In Barker, supra, 92 S.Ct. at 2189, the Supreme Court held that "presuming waiver of a fundamental right from inaction is inconsistent with this court's pronouncements on waiver of

of constitutional rights." Also it expressly rejected the rule that a defendant who fails to demand a speedy trial forever waives his right. Id., 92 S.Ct. at 2191. The Supreme Court, specifically holding that the courts and the prosecutors have "the primary burden . . . to assure that cases are brought to trial," noted:

> . . . We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule....Id.

See also ABA Standards Relating to Speedy Trials §2.2.

There was no demonstration of waiver of the right to a speedy trial by Appellant. Quite the contrary, Appellant as early as March 9, 1974, filed a pro se motion to dismiss because of the denial of a speedy trial.

This factor, as do the other two, weighs in favor of Appellant.

(4) Prejudice to the Defendant

In Barker, supra, at 2193, the Supreme Court identified three interests of a defendant which the speedy trial was designed to protect. These interests are: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. See Smith v. Hooey, 386 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 601 (1969).

In the case sub judice, the prejudice to Appellant is obvious because the delay caused the absence of at least two witnesses material to Appellant's defense (T.R., Vol. II, pp. 235-236). Also the death of potential witnesses added to

Appellant's prejudice since it prevented him from adequately preparing his case.

In Dickey, supra, the Supreme Court was faced with a factual situation remarkedly similar to the case at bar. In the cited case, the defendant was tried in 1968 on charges allegedly committed in 1960. The day before the trial, Dickey's appointed counsel moved for a continuance so that the whereabouts of two witnesses could be determined, and also moved to dismiss because the defendant was denied a speedy trial. Reversing the defendant's conviction because during the delay two witnesses died and another potential defense witness was alleged to have become unavailable, the Supreme Court stated:

> The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less in criminal cases. . . Here however, no valid reason for the delay existed; it was exclusively for the convenience of the State. On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law. Id., 90 S.Ct. at 1568-1569. [My emphasis added].

In the case sub judice, the three year delay created significant prejudice to Appellant. This delay prejudiced Appellant's ability to defend against the charge.

Accordingly, since Appellant's claim of both delay and prejudice is uncontroverted by the prosecution, Appellant's conviction must be reversed.

V.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE THE PROSECUTION'S ONLY EVIDENCE OF GUILT WAS THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

According to the charge in the indictment, Appellant on or about July 7, 1972, in Pike County, Kentucky, aided and abetted in the murder of Gladys Deskins (T.R., Vol. I, p. 2). Although the indictment alleged the crime was committed on July 7, 1972, it is clear that the murder took place around July 11 and 12, 1971.

In an effort to prove the charged offense, the prosecution called twenty witnesses to the stand; ten of the witnesses, however, offered no evidence to connect Appellant with the killing; one witness was an accomplice as a matter of law; and the remainder of the witnesses' testimony was legally insufficient to corroborate that of the accomplice.

The first witness called to the stand by the prosecution was Linda Sue Adkins, the next door neighbor of the deceased. Mrs. Adkins testified that she saw Gladys Deskins alive on Sunday, July 11, 1971 (T.E., Vol. II, p. 161). She further testified that around midnight on the night of July 11, while visiting another neighbor, she heard the dogs barking (T.E., Vol. II, p. 158); however, Mrs. Adkins stated that she did not hear a gun shot that night (T.E., Vol. II, p. 160). Finally, the witness testified that about 9:00 a.m., on July 12, 1971, she went to Mrs. Deskins' home and found the deceased in bed (T.E., Vol. II, p. 155), lying "on her stomach," with her head at the corner of the bed by the walls (T.E., Vol. II, p. 157).

The next prosecution witness was E. F. Sanders, a freelance photographer. All he had to offer the jury was that he took aerial photographs of the victim's farm on March 1, 1973 (T.E., Vol. II, pp. 163, 166).

Next came Trooper Paul Maynard for the prosecution. He testified that he went to the crime scene the morning of July 12, 1971 (T.E., Vol. II, p. 173), and made photographs of the scene (T.E., Vol. II, p. 174). It was through Trooper Maynard that the photographs of the victim were introduced into evidence (T.E., Vol. II, pp. 183-189).

Monroe Gene Hall, Deputy Coroner of Pike County, was the next prosecution witness. He testified that he made a partial examination of Gladys Deskins at the scene (T.E., Vol. II, p. 192), and found that Mrs. Deskins had "several stab wounds in the body," and a "gunshot wound had removed part of the frontal lobe. . . of the skull" (T.E., Vol. II, p. 193).

The next witness for the prosecution was James H. Harmon, a Detective-Sergeant with the Kentucky State Police. He testified that when he received information of Mrs. Deskins' murder, he and Sheriff Kazee then proceeded to the scene (T.E., Vol. II, p. 196). He also testified that when he arrived on the scene he found "signs of forced entry," a shoe box containing two hand guns under the victim's bed, purse containing approximately $300.00, and a subsequent search turned up $700.00 which "was pinned in the inside of her brassiere" (T.E., Vol. II, pp. 196-197). According to the further testimony of Mr. Harmon, he found two sets of footprints which came from Johns Creek and led to the victim's house (T.E., Vol. II, p. 197-198). He also testified that he found two 410 shotgun shells on the railroad tracks (T.E., Vol. II, p. 199), although he did state that he did not know where they came

from or how long they had been there (T.E., Vol. II, p. 206). Finally, he testified that he found nothing at the scene of the crime that would link Appellant to the crime (T.E., Vol. II, p. 207).

Detective C. D. Potter was the next prosecution witness. Detective Potter testified that when he received information of Mrs. Deskins' death on July 13, 1971, he went to the scene of the crime (T.E., Vol. II, p. 210). He further testified that when he arrived at the scene he discovered muddy footprints on the kitchen door and on the railroad tracks leading to and from the house (Id.). According to the witness, one set of footprints was produced by a boot, and the other set by a smooth sole shoe (T.E., Vol. II, p. 210-211). Detective Potter then testified that around December 15 or 16, 1971, he went to Terre Haute, Indiana, to interrogate Willard Orison "Woody" Christian (T.E., Vol. II, p. 211). From the information supplied by Woody Christian, Detective Potter testified that he found a 210 gauge sawed-off shotgun around the Caney Fork area on December 21, 1971 (T.E., Vol. II, p. 212), and a pair of shoes directly across from where the gun was found on October 24, 1972 (Id.).

The Commonwealth's next witness was Willard Orison Christian, the person who was jointly indicted with Appellant for the charged offense (T.R., Vol. I, p. 2). Christian testified that Boone Deskins first approached him to murder his wife around the "last part of June" (T.E., Vol. II, p. 261). According to his further testimony, Christian then mentioned the murder offer to Appellant (T.E., Vol. II, p. 262), and they then enlisted the aid of Eugene Thompson (T.E., Vol. II, p. 237). After making a dry run on the Friday before Mrs. Deskins was killed (T.E., Vol. II, p. 267), Christian then

testified that the three of them left for her house again around 10:00 p.m. on Sunday, July 11, 1971 (T.E., Vol. II, p. 251). The witness testified that the three of them got together on this night at the Pizza Inn (T.E., Vol. II, p. 240), and then proceeded to Mrs. Deskins' home (Id.), with Appellant driving the car (T.E., Vol. II, p. 238). According to the further testimony of Christian, after Appellant let him and Thompson out near the Johns Creek High School (T.E., Vol. II, p. 241), the two then proceeded the rest of the way on foot, and waited for Mrs. Deskins to turn her lights out (T.E., Vol. II, p. 242). Christian then testified that he stayed by the barrel beside the railroad tracks while Thompson entered the house (T.E., Vol. II, p. 280), but because Thompson "was making all kinds of noise," Christian then stated that he ran back to the place where Appellant had let the two out (T.E., Vol. II, p. 242), and heard a shotgun blast as he was crossing the creek (T.E., Vol. II, p. 243). According to the further testimony of the accomplice, Appellant then picked the two back up about two or three hours later (T.E., Vol. II, p. 252); that on the way back Appellant stated that he went to the Pizza Inn where he had a cup of coffee with Shorty Cole to establish an alibi (T.E., Vol. II, p. 241); that Thompson stated that he stabbed her eight or nine times and shot her with a shotgun (T.E., Vol. II, p. 299-300); that he threw his shoes away while Appellant and Thompson buried the shotgun and knife (T.E., Vol. II, p. 238). Christian also testified that the following day he was paid $6,900.00 which he later divided with Appellant and Thompson (T.E., Vol. II, pp. 239-240). Finally, Christian testified that he first told of the events in December of 1971 (T.E., Vol. II, p. 240).

The next prosecution witness was Frank E. Eddy. All he had to offer the jury was that he made a search for some shells that were allegedly thrown from the window of the car (T.E., Vol. II, p. 304). However, Mr. Eddy testified he found no shells (T.E., Vol. II, p. 305).

David L. Justice, the next Commonwealth's witness, only told the jury that it was possible for him to be working in his store the first week or two in July of 1971 (T.E., Vol. II, p. 306).

Next came Roger Burgess, the Assistant Chief of Police for Pikeville, for the prosecution. He testified that "close to 10:30" p.m., on Sunday, July 11, 1971, he saw Appellant, Thompson, and Christian at the Pizza Shop (T.E., Vol. II, p. 313). However, Mr. Burgess also stated that when he saw Thompson and Christian, they were not with Appellant (T.E., Vol. II, p. 315).

Next came Patrolman Cal Runyon for the Commonwealth. He also testified that he saw the three coindictees around 10:30 p.m., at the parking lot across from the Pizza Shop (T.E., Vol. II, p. 318), and that he also spoke to Appellant 'around 11:15 or 11:30" p.m., while Appellant was at Jerry's talking to Shorty Cole (T.E., Vol. II, p. 319).

Reepers Branham was the next prosecution witness. He also testified that on Sunday he saw Appellant, Thompson, and Christian in a yellow GTO coming up Division Street (T.E., Vol. II, p. 323); that Appellant was driving (T.E., Vol. II, p. 324); that he saw them between 10:30 and 11:30 (Id.). He also testified that Thompson's apartment was on Division Street (T.E., Vol. II, p. 328).

The next prosecution witness was Constable Arthur "Shorty" Cole who testified that he saw Appellant about 11:30

or 11:45 on Sunday night at Jerry's (T.E., Vol. II, p. 329). Shorty testified that he and Appellant drank a cup of coffee and Appellant stayed until 12:00 (Id.). In fact, the witness testified that it was common for Appellant to come to Jerry's around this time of night to pick up Appellant's wife (T.E., Vol. II, p. 331).

Sandra Thompson, the wife of Eugene, was then called to the stand by the prosecution. Sandra testified, that the night before she learned of Gladys Deskins' murder, Eugene left the house about 10:00 p.m., stating that he was "going fishing" (T.E., Vol.III, p. 334), and that when he returned the next morning his clothes were all wet and muddy (T.E., Vol. III, p. 335). She also testified that Eugene had about $2,500.00 that afternoon (Id.). Finally, the prosecutor improperly introduced a prior inconsistent statement of Sandra which was to the affect that Appellant asked her to say that she was with Eugene that night (T.E., Vol. III, p. 338). [See Argument VI, supra].

The next prosecution witness was William Arnold Riley. He testified that he was locked up in the Floyd County Jail in 1973 with Appellant and Thompson (T.E., Vol. III, p. 351). Through the leading question of the prosecutor, Riley testified that Thompson said that he should have killed Christian while he was at Terre Haute (T.E., Vol. III, p. 353). Finally, after the prosecutor again told the witness what to say, Riley then testified that Appellant said, "It would have been best for both of us if you had of" (Id.).

Delores Jean Cole was the next witness for the Commonwealth. She testified that while Appellant was in the Floyd County Jail she heard him say, "[H]e did not have anything to do with it" (T.E., Vol. III, p. 365). Again through

the leading question of the prosecutor, Delores testified that Appellant stated that he took Thompson and Christian "somewhere" and went and got them (Id.). She also testified that Appellant did not state when he took these people "somewhere" (Id.).

The Commonwealth then called Walter Hammershoy to the stand. He testified that first Appellant told him he had nothing to do with Gladys Deskins' murder, and then Hammershoy stated that Appellant said he drove the car (T.E., Vol. III, pp. 369-370). Hammershoy further testified that when Appellant made these statements, Appellant had been drinking (T.E., Vol. III, p. 370).

The last witness for the prosecution was Alka Baker. She testified that while riding in an automobile with Appellant, Appellant made some comment about "money" (T.E., Vol. III, p. 374).

At this point in the trial, the Commonwealth rested (T.E., Vol. III, p. 375).

At the conclusion of the Commonwealth's case in chief, Appellant's trial counsel moved the court below for a directed verdict of acquittal because the prosecution failed to corroborate the testimony of the accomplice (T.E., Vol. III, pp. 375-376). This motion was overruled (T.E., Vol. III, p. 377).

The Appellant's defense was that of an alibi. The testimony introduced on his behalf was that he and his brother were on their way to Detroit to buy a used car when the murder of Mrs. Deskin was taking place.

Mark Tysar was the first witness to testify on Appellant's behalf. This used car salesman from Michigan testified that Appellant purchased a car from his lot on July 12, 1971 (T.E., Vol. III, p. 390). He further testified

that Appellant signed the purchase order on July 12, 1971 (T.E., Vol. III, p. 388), and that it was not backdated (T.E., Vo. III, p. 398).

James Barber, a handwriting analysis, testified that Appellant's signature on the purchase order was genuine (T.E., Vol. III, p. 411).

Appellant then called William Eugene Thompson, who was convicted for Gladys Deskins' murder, to the stand. Eugene Thompson testified that during the "last part of June," Woody Christian asked him if he would be willing to help Christian rob Gladys Deskins (T.E., Vol. III, p. 429). Thompson testified that on July 11, 1971, he and Christian went to her house and waited until she turned her lights off (Id.). Then between "12:30 and 1:00" p.m., Thompson testified that he kicked the door open and the two went into her house (T.E., Vol. III, p. 433). After Thompson found Mrs. Deskins' purse containing the money (T.E., Vol. III, p. 434), he went into the kitchen and stayed there until he heard Mrs. Deskins scream (T.E., Vol. III, p. 435). Returning to the bedroom, Thompson saw Christian stabbing the deceased and when Thompson tried to stop him, the shotgun Thompson was carrying went off hitting the victim (Id.). Thompson then testified that he buried the shotgun and knife around the Caney Creek area (T.E., Vol. III, p. 437). Finally, Thompson testified that Appellant did not take the two of them over to the victim's house and let them out (T.E., Vol. III, p. 439).

The last witness for Appellant was Eugene Sykes, Appellant's brother. He testified that he and Appellant left for Detroit on Sunday, July 11, 1971, "between 12:30 and 1:00" a.m. (T.E., Vol. III, p. 454). He also testified that Appellant purchased the car on Monday morning (T.E., Vol. III, p. 456).

Once the defense announced closed (T.E., Vol. III, p. 462), the prosecution called witnesses in rebuttal.

Kelly Scott testified that he was in Floyd County Jail with both Appellant and Thompson (T.E., Vol. III, p. 464). He also testified that in reference to Mrs. Deskins' death, Thompson said that if he had it to do over again, he would do it by himself (T.E., Vol. III, p. 465).

Finally, the prosecution called Arnold Turner and Fred Bailey to rebut the testimony of Mark Tysar (T.E., Vol. III, pp. 468, 476).

Again Appellant's trial counsel moved for a directed verdict (T.E., Vol. III, p. 478). However, the motion was overruled.

Appellant submits that since the testimony of Woody Christian was not sufficiently corroborated, the court below erred by overruling trial defense counsel's motion for a directed verdict. Initially it should be noted that Christian was an accomplice as a matter of law (T.E., Vol. III, p. 480).

Because the possibility always exists that an accomplice will falsify his testimony and will incriminate an innocent party in an effort to secure more favorable treatment for himself, the reliability of an accomplice's testimony is inherently suspect. Consequently, under the rules of modern practice, a conviction based solely upon the testimony of an accomplice will not stand. Commonwealth v. Bowling, Ky., 497 S.W.2d 720 (1973). This principle of law is embodied in RCr 9.62, which reads as follows:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. In the absence of corrobo-

> ration as required by law, the court shall instruct the jury to render a verdict of acquittal.

The corroborating evidence required by RCr 9.62 should tend to connect the accused with the commission of the offense. Hopper v. Commonwealth, Ky., 419 S.W.2d 756 (1967). "Evidence sufficient for such corroboration should be of such nature and character as to inspire belief in a reasonable and unprejudiced man that it points toward guilt and links up with the principal fact under investigation." Benge v. Commonwealth, Ky., 476 S.W.2d 618, 620 (1972). Otherwise stated, the requirement of RCr 9.62 is met if the corroborative evidence is of such quality that a reasonable and unprejudiced mind can conclude that it tends to establish some fact that links the accused up with the principal fact of the commission of the offense. Bowling, supra; Flora v. Commonwealth, Ky., 387 S.W.2d 15 (1965).

The type of evidence required to corroborate an accomplice's testimony must be of sufficient integrity to independently give a "ring of truth" to the accomplice's allegations of the defendant's guilt. Bowling, supra, at 721.

In the case sub judice, there was no sufficient corroborative evidence, of a competent nature, that tended to connect the accused with the commission of the offense charged in the indictment.

It must be noted that:

> ...The established rule in the character of cases is that in determining whether the accomplice's testimony is sufficiently corroborated, is to eliminate the testimony of the accomplice, and then measure the other testimony to ascertain if it tends to connect the accused with the commission of the crime charged... Hinton v. Commonwealth, 310 Ky. 435, 220 S.W.2d 1004, 1006 (1949).

When the testimony of the accomplice is eliminated in the instant case, the fact that Appellant went to Jarry's, or that Thompson came home with wet and muddy clothes, or that Thompson allegedly made some statement does not connect Appellant with the commission of the offense.

Neither can it be argued that the testimony that Appellant was seen with Thompson and Christian on Sunday night was sufficient corroboration. This Court has on numerous occasions held that the fact the accused had been with the accomplice shortly before and after the crime was insufficient corroboration. See Walker v. Commonwealth, Ky., 472 S.W.2d 477 (1971); Goodhue v. Commonwealth, Ky., 415 S.W.2d 845 (1967); Hartsock v. Commonwealth, Ky., 382 S.W.2d 861 (1964).

Finally, it cannot be argued that the alleged statements of Appellant in reference to the death of Mrs. Deskins was sufficient corroboration. In the first place, this was not the testimony of the witnesses but rather the testimony of the prosecutor. It was only through the prosecutor's leading questions that Appellant's alleged participation was placed before the jury. But more importantly, the credibility of Hammershoy and Riley, the two witnesses who testified that Appellant admitted involvement in the murder, was such as to destroy the probative value of their testimony.

Appellant admits that it is the province of the jury to judge the credibility of witnesses. However, where the testimony of a witness is so incredible on its face as to require its rejection as a matter of law then the jury is not permitted to consider it. See Daulton v. Commonwealth, 310 Ky. 141, 220 S.W.2d 109 (1949).

In the case sub judice, both Riley and Hammershoy clearly had an interest to testify as the prosecution wanted.

Hammershoy, especially, was very adroit at conveniently remembering additional information when the prosecution's case appeared to be floundering. Because these two witnesses had been impeached--either by the fact that they had their charges suspended (T.E., Vol. III, p. 423), or because they had boasted that they could do anything and get away with it (T.E., Vol. III, p. 357)--their testimony became so untrustworthy as to forbid its consideration by the jury. In fact, the testimony did not have sufficient integrity to independently give a "ring of truth" to the accomplice's allegations.

However, Appellant was convicted in the instant case. Therefore, there is no other conclusion, but that the jury used this testimony to convict Appellant. Because their testimony was so unbelievable, this Court must now reverse Appellant's conviction since the verdict was flagrantly against the evidence.

One final point should be made. The rule is that a conviction is not justified by suspicion and evidence of relationship among the accused persons or by their mere association at a time when a crime was committed by one of them. Moore v. Commonwealth, Ky., 282 S.W.2d 613, 614 (1955). "Mere acquiescence in, or approval of, the criminal act, without cooperation or agreement to cooperation in its commission, is not sufficient to constitute one as aider and abettor." Warfield v. Commonwealth, Ky., 334 S.W.2d 913 (1960).

It is a recognized legal principle that "[g]uilt may not be established . . . by proof of the association of an accused with the perpetrators of a crime both before and after its commission." Commonwealth v. Truglio, Ky., 371 S.W.2d 648, 650 (1963). Mere association, though it may

create a suspicion, is not enough to prove criminal consort. Perkins v. Commonwealth, Ky., 409 S.W.2d 294 (1966).

In the case sub judice, the only evidence which tended to connect Appellant with the charged offense was the testimony of the accomplice, Woody Christian. Since no other competent evidence was introduced to corroborate the testimony of the accomplice, the trial judge was required to grant defense counsel's motion and direct a verdict of acquittal. RCr 9.62; Hartsock, supra.

Accordingly, this Court should reverse the judgment below.

VI.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY ALLOWING INTO EVIDENCE SANDRA THOMPSON'S PRIOR INCONSISTENT STATEMENT SINCE THE PROSECUTION IMPROPERLY IMPEACHED ITS OWN WITNESS.

As has previously been mentioned, the Commonwealth called as one of its witnesses, Sandra Thompson, the wife of Eugene Thompson and relative of Appellant. Sandra, who frequently called Appellant "Uncle Robert" (T.E., Vol. III, p. 333), was then asked on direct examination the following:

Q-29 Did you ever talk to the defendant, Robert Sykes, about this case?

A No.

Q-30 Not at any time?

A No.

Q-31 Have you ever made a statement that you did?

A I don't think so.

Q-32 Did Robert Sykes come to you and tell you if anybody asked you to be sure and tell them that your husband, Eugene Thompson, was home all night; did you ever make that statement to anybody?

A I don't remember.

Q-33 To refresh your recollection, did you make a statement to Chester Potter and Frank Eddy? (T.E., Vol. III, p. 337). [My emphasis added].

At this point, one of Appellant's trial counsel asked to approach the bench. Although the record does not reflect what Appellant's trial counsel said, it is obvious from the subsequent record that defense counsel lodged an objection to the prosecution's improper examination of Sandra. In response to the objection, the Commonwealth's Attorney argued that the question was asked to "impeach" her testimony by

inquiring about a prior inconsistent statement she gave to the investigating officers (T.E., Vol. III, pp. 337-338). The trial judge then overruled defense counsel's objection, and, as grounds, stated that Sandra was a "hostile witness" (T.E., Vol. III, p. 338).

The prosecutor then continued his examination as to the prior inconsistent statement in this manner:

> Q-34 Miss Thompson, I'll ask you whether or not you were asked this question and if you made this answer:
>
> "Has anyone talked to you and asked you not to say anything about this or alibi for them except Eugene Thompson?"
>
> Answer: "Yes, Robert Sykes. He asked me to tell that I was with Eugene that night."
>
> Were you asked that question and did you make that answer?
>
> A I don't remember (Id.) [My emphasis added].

Appellant contends that the impeachment of Sandra Thompson as to an alleged prior inconsistent statement amounted to reversible error because Sandra Thompson was the prosecution's own witness.

It must be admitted that the rule observed in this Commonwealth is that:

> . . . A witness may be impeached by any party, without regard to which party produced him. . . by showing that he had made statements different from his present testimony.....CR 43.07.

However this rule has its limitations.

This Court has on numerous occasions held:

> [T]hat a party may impeach his own witness, by proof of contradictory statements, only where the witness testifies positively to the existence of a fact prejudicial to the party,

> and not where the witness merely fails or refuses to testify as to the existence of a fact that would be favorable to the party... Click v. Commonwealth, Ky., 269 S.W.2d 203 (1954) [My emphasis added].

In the case sub judice, when Sandra was asked whether she had made any statements to the investigating officers, she only replied, "I don't remember" (T.E., Vol. III, pp. 337-338). This clearly was not prejudicial to the prosecution. Rather, her testimony was "merely negative." The fact that Sandra may have been a "hostile witness," even when coupled with the fact that she failed to testify as the prosecutor has hoped, did not give the prosecutor the right to impeach her testimony.

In Webb v. Commonwealth, Ky., 314 S.W.2d 543 (1958), this Court was faced with a factual situation remarkably similar to the case at bar. In the cited case, the defendant was indicted for the murder of his father. The Commonwealth called Bobby Webb, the brother of the defendant and son of the deceased, as its witness. On direct, the witness was asked about various statements allegedly made by him after the murder to two policemen. The witness' replies were that he did not know or remember whether he made the statements. After repeated efforts to get the witness to admit that he made the statements, the prosecution introduced the two officers who testified as to the statements allegedly made by Bobby Webb. The trial court permitted this testimony on the theory that the prosecution was impeaching a "hostile witness." Reversing the conviction because the prosecution improperly impeached its own witness, this Court stated:

> The rule was early stated to be that where a witness merely fails to prove what is expected, the party cannot make substantive evidence by proving the previous statement of the witness... The effect of the rule is to prohibit the introduction of prior extrajudicial statements the impeachment of one's own

> witness whose testimony is of a negative nature and who fails to prove what was expected... Id., at 545.

See also McQueen v. Commonwealth, Ky., 393 S.W.2d 788 (1965).

Also in Click, supra, this Court was faced with a factual situation remarkedly identical to the case at bar. In the cited case, the defendant was indicted for murder. Before offering Lloyd Click, who was the nephew of the defendant, the Commonwealth stated that since Lloyd was a "hostile witness," the prosecution planned to impeach his testimony. Upon being questioned, the witness would not say that the defendant shot the victim, and the witness claimed to have no idea who fired the shot. Also when the witness denied having made previous statements, the prosecution introduced witnesses who testified that Lloyd said that the defendant shot the victim. Reversing the conviction because the prosecution improperly impeached its own witness, this Court said:

> If the testimony is merely negative or the witness fails to make the statements which the party introducing him apparently expected, he will not be permitted to get before the jury the anticipated evidence by this second-hand method, Id., at 205.

In the case at bar, the obvious purpose for the introduction of the prior inconsistent statement was not for impeachment, but for substantive evidence. This fact is apparent since the trial judge failed to admonish the jury as to the purpose for which the evidence was received. The fact that the true intent of the prosecutor was to get this evidence before the jury substantively is also quite clear since during his closing argument the prosecutor stated:

> . . . Sandy Thompson got on the stand. She told you that Robert Sykes asked her to tell anybody that came and talked to her about it that Eugene was home all night... (T.E., Vol. III, p. 517). [My emphasis added].

However, this evidence could not be introduced substantively since the prosecution failed to lay a proper foundation for Sandra's testimony as required by CR 43.08. The requirement of a proper foundation applies even when a party seeks to impeach its own witness. 2 Wharton's Criminal Evidence §468 (1972).

However, in the instant case, the prosecutor only asked Sandra if she made "a statement to Chester Potter and Frank Eddy" (T.E., Vol. III, p. 337). No attempt was made to delineate the date or the location when the statement was allegedly given to these two officers.

Because the specific foundation as required by CR 43.08 was not met, the prior inconsistent statement of Sandra Thompson should not have been admitted into evidence. Norton v. Commonwealth, Ky., 471 S.W.2d 302 (1971); Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969).

Regardless of how the evidence was received by the jury, the introduction of the prior out-of-court statement that Appellant wanted Sandra to say that Eugene had been at home all that night, denied Appellant his right to a fair trial. There was no competent or legally sufficient evidence to corroborate the testimony of the accomplice. Yet, it is obvious that the jury used this alleged admission of Appellant as a link which the jury felt tended to connect Appellant to the charged offense. However, the jury's use of this prior out-of-court statement violated Appellant's right to a fair trial and to due process of law.

Because the trial court allowed the prosecution to improperly impeach its own witness, which prejudiced the substantial rights of Appellant, this Court must now reverse Appellant's conviction.

VII.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY ALLOWING INTO EVIDENCE TESTIMONY CONCERNING EUGENE THOMPSON'S PRIOR INCONSISTENT STATEMENT SINCE NO PROPER FOUNDATION HAD BEEN ESTABLISHED.

Appellant realizes that this Court held in Jett v. Commonwealth, Ky., 436 S.W.2d 788, 792 (1969), that "an out-of-court statement made by any person who appears as a witness, which statement is material and relevant to the issues of the case, may be received as substantive evidence through the testimony of another witness, and need not be limited to impeachment purposes."

Appellant contends, however, that Kelly Scott's testimony concerning Eugene Thompson's prior out-of-court statement was inadmissible because the prosecution failed to lay a proper foundation of Thompson as required by CR 43.08.

At the close of the cross-examination of Thompson, the prosecutor attempted to elicit from him a statement which Thompson allegedly made in the presence of William Riley. In an attempt to establish the foundation for the introduction of Thompson's alleged prior inconsistent statement, the prosecutor engaged in the following dialogue with Thompson:

Q-110 Did you spend some time in this jail right here in this town with Robert?

A- Yes, I did.

Q-111 Did you and he discuss what you should have done to Woody Christian in Terre Haute?

A- No.

Q-112 To have kept him from telling on the two of you?

A- No, we didn't.

. . . .

Q-116 Do you know William Riley?

A- Yes.

Q-117 Did you talk about it in front of him?

A- No.

Q-118 Did you tell Mr. Riley that you killed Gladys Deskins and if you had it to do over you would do it again?

A- I didn't tell anyone at that time because that would have been foolish. . . .(T.E., Vol. III, p. 451). [My emphasis added].

Immediately after the defense announced closed, the prosecution called Kelly Scott in rebuttal and specifically asked did Thompson make any statements about the death of Gladys Deskins while he was lodged in the Floyd County Jail (T.E., Vol. III, p. 464). Scott then testified that Thompson said that if he had to do it [kill Mrs. Deskins] over again, he would do it by himself (T.E., Vol. III, p. 465).

In Jett, supra, this Court expressly noted that the foundation prescribed by CR 43.08 must be laid before the principle of Jett may become operative. Benson v. Commonwealth, Ky., 463 S.W.2d 122, 124 (1971).

CR 43.08 categorically enumerates what is required to lay the foundation for the introduction of a prior inconsistent statement of a witness. The rule provides:

> Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with the opportunity to explain it. [My emphasis added].

It is apparent that CR 43.08 explicitly requires the examining party to specify to the witness "the circumstances

of time, place, and persons present" when the alleged prior statement was made. Such a "foundation" or "warning" enables the witness to focus his memory on a specific incident so that he may better recall if he did utter the alleged remark. Additionally, the requirement of a specific "foundation" provides the witness a fair opportunity of explaining the prior inconsistent statement.

However, the prosecution in the case at bar only asked Thompson if he "[spent] some time in this jail right here in this town." No attempt was made by the prosecution to delineate the date when the alleged statement was given. Also the prosecutor did not correctly identify the person present when the alleged statement was given. The prosecutor asked Thompson did he make a statement to "Mr. Riley" and thus the prosecutor proceeded to call "Mr. Scott" on rebuttal.

Because the specific foundation as required by CR 43.08 was not met, the prior inconsistent statement of Thompson should not have been admitted into evidence.

It must be admitted that this error was not preserved for appellate review by Appellant's trial counsel. However, this Court, to prevent a "manifest injustice," can review this error and grant appropriate relief. Stone v. Commonwealth, Ky.,.456 S.W.2d 43 (1970).

The testimony of Thompson was very crucial to Appellant because Thompson testified that Appellant did not participate in the murder of Gladys Deskins. However, the prosecutor was allowed to improperly attack Thompson's credibility at every instance [See Arguments VIII and IX, supra]. During the direct examination of Thompson by the defense, Thompson testified that he accidentally shot Mrs. Deskins when

he attempted to prevent Christian from stabbing the deceased. But the improper introduction of the prior inconsistent statement painted Thompson as a murderer who at the first opportunity would kill again. The obvious impact of this was that Thompson was a liar, and that his testimony that Appellant was not involved in the murder could not be believed. Therefore, this Court must review this error to prevent a "miscarriage of justice."

In view of the Commonwealth's failure to satisfy the requirements of CR 43.08 in the case at bar, the trial judge should have ruled that Scott could not relate to the jury a prior out-of-court statement of Thompson.

Because substantial prejudice to Appellant resulted, this Court must now reverse Appellant's conviction. Norton v. Commonwealth, Ky., 471 S.W.2d 302 (1971).

VIII.

THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE COURT BELOW PREVENTED APPELLANT FROM REHABILITATING THE CREDIBILITY OF EUGENE THOMPSON.

In an attempt to exercise his constitutional right to present a defense, Appellant called Eugene Thompson to testify in his behalf (T.E., Vol. III, p. 424). Mr. Thompson had already been tried, convicted, and was serving a life sentence for the murder of Gladys Deskins (T.E., Vol. III, p. 426).

The record shows that prior to Mr. Thompson's taking the stand, the trial judge held an in chambers hearing to inquire whether Mr. Thompson fully realized the consequences of his testimony (T.E., Vol. III, pp. 424-427). The trial judge informed the witness that anything he testified to now for which he had not already been tried would amount to self-incrimination (T.E., Vol. III, p. 425); that his testimony could affect his parole (T.E., Vol. III, p. 426); that if his testimony differed from his former testimony, he might be committing perjury (Id.). The trial judge also had a local attorney talk to Mr. Thompson in order to see if Mr. Thompson fully realized the ramifications of his taking the stand (T.E., Vol. III, pp. 426-427).

It must be pointed out at this time that none of the witnesses for the Commonwealth had been so admonished as to the consequences of testifying. Rather, the trial judge singled out this one witness to reiterate that the witness did have something to lose by testifying. See Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972).

Nevertheless, Mr. Thompson took the stand to testify in Appellant's behalf.

On direct examination, Thompson testified fully as to his part in the alleged robbery and subsequent killing of Gladys Deskins (T.E., Vol. III, pp. 429-438). He further testified that if Appellant had anything to do with the murder of Gladys Deskins, he did not know anything about it (T.E., Vol. III, p. 439). Thompson specifically denied that Appellant took he and Woody Christian over to the house of the deceased on the night of the murder (Id.).

The effect of the testimony elicited upon the cross-examination of Eugene Thompson was to demonstrate to the jury that the witness' story should not be believed beyond the point of his admission of his role in the murder. The Commonwealth's Attorney emphasized the untruthfulness of Thompson's testimony in his closing argument (T.E., Vol. III, p. 516). [See Argument IX].

Thompson admitted during cross-examination that at all of the prior trials for the murder of Gladys Deskins he had denied any knowledge whatsoever of her death (T.E., Vol. III, p. 440). The Commonwealth's Attorney insinuated that Mr. Thompson was lying at the present trial when he refused to implicate Appellant in the murder, and that the witness was simply "trying to bail [his] old buddy out" (T.E., Vol. III, p. 446). The inference established by the prosecution was that why should the jury believe the witness was telling the truth now after he had lied about the facts for the past four years (Id.).

In his closing argument to the jury, the Commonwealth's Attorney stated, "[D]o you want to believe him now when he has got nothing to lose, when he is tryint [sic] to help bail Robert out?" (T.E., Vol. III, p. 514).

Because Mr. Thompson did have something to lose if he testified perjuriously, and because the prosecutor had impeached his testimony, Appellant's trial counsel attempted to rehabilitate Mr. Thompson's credibility by redirect examination (T.E., Vol. III, p. 451). However, the Commonweath's Attorney objected (Id.), and this objection was sustained by the trial judge.

Defense counsel then made the following avowal as to the statements Mr. Thompson would make if counsel had been permitted to conduct his redirect examination:

> 1. Mr. Thompson, actually you have everything to lose and nothing to gain here today, is that correct?
>
> A. Yes.
>
> 2. Have you been advised by an attorney about your testimony here today?
>
> A. Yes.
>
> 3. Have you been advised that you could jeopardize any chance to parole that you might have by your testimony?
>
> A. Yes, I have.
>
> 4. Have you been advised you could be indicted for perjury by your testimony?
>
> A. Yes, I have. (T.E., Vol. III, p. 452).

The testimony of Mr. Thompson during the avowal was extremely similar to the admonishment given to the witness by the trial court prior to his taking the witness stand. The avowal showed that Thompson realized the consequences of his testimony; that he knew that he had "everything to lose and nothing to gain"; that he "could jeopardize any chance for parole"; that he "could be indicted for perjury" (Id.).

At the close of the avowal, the trial court ruled that the record could not be read to the jury (T.E., Vol. III, p. 453), and Appellant's counsel then moved the trial court for a mistrial (Id.). However, this motion was also overruled (Id.).

Appellant contends that it was reversible error to prohibit trial defense counsel from offering evidence on redirect examination to rehabilitate this material witness, and that to deny this testimony was a violation of due process of law since it prevented Appellant from putting in a defense.

In Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), the Supreme Court observed:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. Id., 87 S.Ct. at 1923. [My emphasis added].

In presenting the testimony of Eugene Thompson, Appellant had as strong an interest as did the defendant in Washington, supra. The accomplice in Washington offered to testify that the defendant did not shoot the victim; Eugene Thompson testified that Appellant did not participate in Gladys Deskins' murder. In each case, if believed, the testimony would have altered the outcome of the trial in favor of the accused.

The testimony of Mr. Thompson was vital to Appellant since it demonstrated that Appellant had not been a participant in the alleged crime. Thompson's credibility as a witness was,

therefore, a vitally important issue in the case. In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the Supreme Court of the United States stated:

> ...The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. . . .Id., 79 S.Ct. at 1777.

Appellant contends that any possible interest of the witness in not testifying falsely would be relevant to the witness' credibility and the jury should be entitled to know about it.

In the case at bar, Appellant was denied an opportunity to present evidence which went directly to the issue of the witness' credibility. The trial court, by refusing to allow Mr. Thompson to testify on redirect, denied Appellant the right to present his defense by proving that his witness had no reason whatsoever to testify falsely.

The clear implication of Mr. Thompson's testimony in cross-examination was that the witness testified falsely in order to get Appellant "out of the fix he's in" (T.E., Vol. III, p. 446). Lest the inference prove too much for the jury, the Commonwealth's Attorney, in his closing argument, emphasized it in this manner, "Now, do you want to believe him now when he has got nothing to lose, when he is tryint [sic] to help bail Robert out?" (T.E., Vol. III, p. 514).

But Mr. Thompson did in fact have something to lose by taking the stand for Appellant. That this is true is readily apparent from the in chambers hearing that the trial judge conducted before Mr. Thompson took the stand. But the jury was

not afforded the benefit of hearing either the avowal or in chambers hearing; therefore, the jury was left with the impression that since the witness had "nothing to lose," he might have a possible interest in testifying falsely; i.e., "to bail [his] old buddy out." This inference was bolstered by the improper testimony of Walter Hammershoy who stated that he overheard the witness and Appellant talking about how "if Eugene got convicted he (Eugene) was going to cover up for Robert" (T.E., Vol. III, p. 465). Appellant submits that the failure of the trial court to allow Mr. Thompson to explain his testimony to the jury had the effects of depicting the witness as a deliberate liar and materially strengthened the Commonwealth's case.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).

Since Appellant was denied his constitutional right to present a defense when the trial court refused to let Appellant rehabilitate the credibility of Eugene Thompson, this Court must now reverse Appellant's conviction.

IX.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE PROSECUTION TO MAKE IMPROPER, PREJUDICIAL AND INFLAMMATORY COMMENTS DURING CLOSING ARGUMENT.

In Bowling v. Commonwealth, Ky., 279 S.W.2d 23 (1955), this Court delineated the scope of the prosecutor's duties and responsibilities by stating:

> . . .[I]t is the obligation of the prosecuting attorney to conduct himself with due regard to the proprieties of his office and to see that the legal

> rights of the accused, as well as those of the Commonwealth, are protected. It is his duty to prosecute but not persecute. He should endeavor to see that justice is meted out and that the accused is dealt with fairly. . . .
>
> . . . .
>
> More specifically, the Commonwealth Attorney, in argument, should refer only to evidence heard from the witness stand and should scrupulously keep within the record. Id., at pp. 24-25.

In the past, this Court has acknowledged its responsibility to condemn the use of unfair methods of prosecutors to obtain convictions. In Taulbee v. Commonwealth, Ky., 438 S.W.2d 777, 779 (1969), this Court stated:

> An attorney for the commonwealth should never forget his high position; should never forget it is his duty to protect the innocent just as much as it is his duty to prosecute the guilty. He represents all the people of the Commonwealth, including the defendant; he should in an honorable way use every power that he has, if convinced of the defendant's guilt, to secure his conviction, but should always remember he stands before the jury clad in the official raiment of the Commonwealth, and should never become a partisan. . . .

Appellant submits that on four instances, the prosecutor made comments which prejudiced Appellant in the eyes of the jury.

The Supreme Court has recognized that a prosecutor's egregious misconduct in closing argument can amount to a denial of constitutional due process. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974). In the case at bar the totality of the prosecutor's improper argument, under the circumstances, did not comport with the "fundamental fairness" requirement of due process.

On the basis of these improper comments, Appellant's conviction must be reversed.

A.

THE PROSECUTOR MADE IMPROPER AND PREJUDICIAL COMMENT WHEN HE APPEALED TO THE PASSIONS AND PREJUDICES OF THE JURY.

Shortly after commencing his closing argument, the prosecutor told the jury that he would like to apologize to them for having to bring three cold-blooded assassins into the courtroom. The prosecutor in his inflammatory rhetoric stated:

> . . .Can you imagine how they [daughters of Mrs. Deskins] feel with a father that hired their mother killed and have to sit here and watch the three killers move around in this courtroom? That is one thing I want to apologize to you people for, and I have watched you closely as a jury. I am very much impressed with your attentiveness, your attitude about it and your carefulness in seeing what goes on, but I want to apologize to you, and in the years to come you will remember it. We have brought you into a room with three cold-blooded assassins who will go out in the middle of the night, wade a creek with a shotgun and a hunting knife or a long bladed knife, break down a door on a woman that lives in a little small frame house by herself and leave her laying [sic] there with her head blowed off. (T.E., Vol. III, p. 512). [My emphasis added].

This type of argument is prohibited by Standard 5.8(c) of the Prosecution Function contained in the American Bar Association's Standards Relating To The Prosecution Function. That section of the Standard states, "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

The Commentary to that Standard also notes:

> Arguments which rely upon. . .other prejudices of the jurors introduce elements of irrelevance and irrationality into the trial which cannot be tolerated in a society based upon equality of all citizens before the law. . . .

In effect, the closing argument of the prosecution was an attempt to introduce extraneous issues into Appellant's trial which could have no other purpose but to inflame the passions of the jury against Appellant. That this is the case is readily apparent from the flagrant use of the words "hired killers."

In one of his many references to Appellant, the prosecutor argued to the jury:

> . . ."How do you catch a hired killer when he is slick enough to try to establish alibis." Put two boys out beside of the road and say "Go and kill Gladys Deskins and I will come back and get you, I'll run over to Jerry's nine miles away and sit around with the constable and then come back over and get you. I'll run up to Detroit and go in and get some unsuspecting used car dealer to back date a statement to show that I was out of town". . . .(T.E., Vol. III, p. 513).

The prosecutor finally finished this prejudicial line of argument when he stated:

> . . .Please, and I am begging to you, don't let one hired killer come into this courtroom in Floyd County and talk you into turning another one loose.
>
> I don't know how you all feel about it, but when one killer gets on and trys to bail another one out, if the law permitted, I would hope that I could add a little bit extra on, because that is what they deserve. . . . (T.E., Vol. III, p. 522).

The argument in the case at bar was extremely prejudicial to Appellant because all the evidence of Appellant's guilt came from the uncorroborated testimony of Woody Christian. The prosecution produced no competent corroborative evidence to legally sustain a conviction. Therefore, such references to Appellant as a "hired killer" amounted to going outside the record in an obvious attempt to prejudice Appellant.

In Barker v. Commonwealth, 268 Ky. 248, 104 S.W.2d 976 (1937), this Court noted that:

> . . .it has been consistently held that [prosecutors] should not go outside the record and discuss matters inclined to inflame or prejudice the minds of the jurors. . . .Id., 104 S.W.2d at 978.

See also Standards Relating To The Prosecution Function §5.8(a).

Since:

> ...it is clear that the prosecuting attorney's argument went outside the record, climbed the stairway of speculation, went beyond reasonable inferences deducible from any evidence produced, fancied an illusionary situation in such dramatic and realistic fashion as to arouse a possible prejudice in this jury against appellant...on this trial. Sexton v. Commonwealth, 304 Ky. 172, 200 S.W.2d 290, 293 (1947).

this Court must now reverse Appellant's conviction.

B.

THE PROSECUTOR MADE IMPROPER AND PREJUDICIAL COMMENT WHEN HE CONTINUALLY EXPRESSED HIS OPINION AS TO THE CREDIBILITY OF EUGENE THOMPSON.

It is improper for a prosecutor to state his opinion as to the credibility of a witness as was done in the case sub judice. In an effort to denigrate Eugene Thompson's testimony, the prosecutor stated:

> ...Now, do you want to believe him now when he has got nothing to lose, when he is tryint (sic) to help bail Robert out? I don t believe you will! . . . (T.E., Vol. III, p. 514) [My emphasis added].

Throughout his entire closing argument, the prosecutor continually expressed his personal belief and opinion of the veracity of Eugene Thompson. For instance, in discussing how Thompson testified that the shotgun he was carrying went off, accidentally shooting Gladys Deskins, the

prosecutor remarked:

> I don't believe there is a word that came out of that boy's mouth that is the truth except the fact that he was in on the killing, and he was there that night. Like I say, he is a three-time loser, he is gone. . . .

The prosecutor continued this improper diatribe when he stated:

> ...This defendant, Robert Sykes, and I think when you look at Eugene Thompson there is no doubt in anybody's mind that that boy could do it, and he did it, and Robert Sykes knew that he could do it and that is the reason that he picked him. . . .(T.E., Vol. III, p. 519). [My emphasis added].

The ultimate issue of credibility is for the jury alone. The prosecutor's personal beliefs and opinions as to the truthfulness of the testimony of a witness must be avoided; otherwise the veracity of the prosecutor may be placed in issue. See United States v. Daniel, 422 F.2d 816 (6th Cir. 1970); accord, Terry v. Commonwealth, Ky., 471 S.W.2d 730 (1971). A conviction must stand on the evidence, not on the personal vouching of a prosecutor.

This position is also recognized by the American Bar Association in its Standards Relating To The Prosecution Function. Standard 5.8(b) states in pertinent part:

> It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony. . . .

This Standard's Commentary explains this concept:

> Such expressions by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of his office and undermine the objective detachment which should separate a lawyer from the cause for which he argues. Such argument is expressly forbidden. . . .
>
> ...Neither advocate may express his personal opinion as to. . .the veracity of witnesses. Credibility is solely for the triers. . . .

The prosecutor's closing argument was a clear attempt by him to invade the jury's function. By using his authority to create certain inferences in the minds of the jurors as to the credibility of Eugene Thompson, the prosecutor was misusing his position as a representative of the people.

This was extremely prejudicial to Appellant because the prosecutor constantly characterized Eugene Thompson as a man who had nothing to lose, [See Argument VIII, infra], and therefore, could not be believed.

Accordingly, this Court must now reverse Appellant's conviction.

C.

THE PROSECUTOR MADE IMPROPER AND PREJUDICIAL COMMENT ABOUT APPELLANT'S WIFE'S FAILURE TO TESTIFY.

Near the end of his completely prejudicial closing argument, the prosecutor told the jury:

> ...So when you start greeting people - this is the fellow that thought he was smart - he drove the car and went back to town - he drove to Michigan to get an alibi. He says that he went up to Jerry's to pick up his wife. Well, where is his wife? Why didn't she take that witness stand say that "He came and got me" because he didn't. . . . (T.E., Vol. III, p. 520) [My emphasis added].

It is reversible error for the prosecutor to comment on the failure of Appellant's wife to take the stand.

KRS 421.210(1) provides that "...neither [husband or wife] may be compelled to testify for or against the other." Also this Court has consistently condemned, as improper and prejudicial to the substantial rights of Appellant, comment by the prosecutor concerning the failure of the accused's spouse to testify. See Sexton v. Commonwealth, 304 Ky. 172, 200 S.W.2d 290 (1947).

In the case at bar, the substantial rights of Appellant were prejudiced. The jury got the impression that since Appellant's wife did not testify then Appellant must have been establishing an alibi. This caused the jury not to consider the fact that Appellant constantly picked his wife up at work (T.E., Vol. II, p. 331).

In Gossett v. Commonwealth, Ky., 402 S.W.2d 857 (1966), this Court was faced with a factual situation remarkedly identical to the case at bar. In the cited case, the chief witness for the prosecution testified that the defendant accompanied by his wife drove up in front of the witness' residence and waited until two men appeared in another car. The witness then testified that the defendant handed the occupants of the other car two half pints of whiskey. During the closing argument, the prosecutor asked why did not the attorney put on the defendant's wife and let her deny these things took place. Reversing the conviction due to the improper closing argument of the prosecutor, this Court stated:

> It is written in KRS 421.210. . . that "neither (husband or wife) may be compelled to testify for or against the other." Comments by the Commonwealth's attorney on failure of the wife to testify or failure of the husband to call the wife as a witness are improper, prejudicial, and have been consistently condemned by this Court. . . . Id., at 858-859.

Because the failure of the wife to testify was not a legitimate subject matter for argument by the prosecutor, this Court must reverse Appellant's conviction.

D.

THE PROSECUTOR MADE IMPROPER AND PREJUDICIAL COMMENT ABOUT APPELLANT'S FAILURE TO TESTIFY.

The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. Applying this principle to the permissible range of the prosecution's closing arguments, the Supreme Court in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), held that it was reversible error for the prosecution or the court to comment on an accused's failure to take the stand and testify in his own behalf. In applying the Fifth Amendment to the states by reason of the Fourteenth Amendment, the Supreme Court noted that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice.'" Id., 85 S.Ct. at 1232. To allow such comment would impose a penalty on the exercise of a constitutional right.

In this Commonwealth, the prosecutor is precluded from commenting on an accused's invocation of the privilege against self-incrimination not only by the Fifth Amendment and Section II of the Kentucky Constitution, but also by a direct and positive statutory prohibition. KRS 421.225 states:

> In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him. [My emphasis added].

In commenting on an earlier version of this statute, this Court stated in Bradley v. Commonwealth, Ky., 261 S.W.2d 642 (1953):

> This statute declares an elementary rule of practice and should be up-

> held by prosecuting officials under their oaths of office. Courts cannot tolerate a violation of it and maintain the dignity of the commonwealth and their own self-respect. When clearly disregarded, whether willfully or through inadvertence or ignorance, a verdict of guilty based thereon should be set aside and a new trial granted, as it must be presumed that an unlawful prosecution is prejudicial to the defendant. Id., at 643.

In the cited case this Court, in reversing the conviction, specifically held that it was the duty of the trial judge to prevent any comment by the prosecutor on an accused's invocation of his constitutional right to remain silent:

> It was the duty of the trial judge to have checked the prosecuting attorney's unfair and unlawful comment. We regard the misconduct of the Commonwealth's Attorney as prejudicial to the substantial rights of the defendant. Id., at 643.

Appellant notes that the trial judge in the instant case failed to interrupt the prosecutor during his closing argument or to declare a mistrial.

In reversing the conviction in Adams v. Commonwealth, Ky., 264 S.W.2d 283 (1954), due to the reference by the prosecutor in the presence of the jury to the defendant's failure to testify on his own behalf, this Court stated:

> The privilege of an accused person against having his silence questioned is a corrollary to his constitutional right against self-incrimination and has always been zealously guarded by the courts. In those cases where the representative of the Commonwealth infringes upon this right, an admonition by the court to disregard the improper remarks is not considered sufficient to cure the error. . . . Id., at 286.

In the case sub judice, the prosecutor made this comment about Appellant's failure to testify:

> ...But when this defendant here got on the witness stand in the Boone

> Deskins trial, volunteered as a witness for Boone Deskins. . . . (T.E., Vol. III, p. 523). [My emphasis added].

Although this was an indirect reference, "the comment [was] reasonably certain to direct the jury's attention to the defendant's failure to testify." Neal v. Commonwealth, Ky., 302 S.W.2d 573, 577 (1957); Miller v. Commonwealth, 182 Ky. 438, 206 S.W. 630 (1918).

This comment unnecessarily called the jury's attention to the fact that Appellant failed to testify on his own behalf since the prosecutor was telling the jury that Appellant took the stand in the earlier trial and told of his alibi.

This comment was not just "mildly inferential" or "isolated," but rather, the comment of the prosecutor was manifestly intended to be or was of such a character that the jury naturally and necessarily took it to be a comment on Appellant's failure to testify.

Since it cannot be said beyond a reasonable doubt that this comment "did not contribute to the verdict obtained," Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), this Court must reverse Appellant's conviction.

E.

THIS COURT CAN REVIEW THE CITED OCCASIONS OF PROSECUTORIAL MISCONDUCT ALTHOUGH NO COMMENT WAS TECHNICALLY PRESERVED FOR APPELLATE REVIEW.

Even though Appellant's trial counsel did not object to the prosecutor's improper conduct, Appellant submits that this Court can review these allegations of error since the prejudicial comments of the prosecutor resulted in "a manifest injustice." Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970).

Additionally, the Sixth Circuit Court of Appeals in United States v. Black, 480 F.2d 504 (6th Cir. 1973), held that even where no objection is made to a prosecutor's improper closing argument, an appellate court should intercede "where the error would seriously affect the fairness, integrity or public reputation of judicial proceedings." Id., at 507.

The District of Columbia Circuit has also held that failure to object to a closing argument does not preclude appellate review. In Garris v. United States, 390 F.2d 862 (D.C. Cir. 1968), the court held that the prosecutor's reference to certain evidence in his closing argument was improper as well as prejudicial despite the strength of the government's total case, and that because it was plain error reversal was proper despite the failure to object at the time of the argument. The court in Garris indicated that:

> . . .Once the facts in questions were suddenly stated to the jury in the course of the prosecutor's summing up, the defense might well have had to make a snap judgment as to whether only greater harm could come from interrupting the argument to the jury and thereby focussing the latter's attention even more emphatically upon the facts in question. We do not think the Government may now complain that the defense failed to impale itself upon one horn or the other of the dilemma imposed upon it by the prosecutor's lapse. Id., at 865.

Recently, this Court has re-emphasized the stature a Commonwealth Attorney has among the community, as well as his corresponding duties in the criminal system:

> One of the finest offices the public can give to a member of the legal profession in this state is that of Commonwealth's Attorney. Its very status becomes a mantle of power and respect to the wearer. Though few are apt to wear it lightly, some forget, or apparently never learn to

> wear it humbly. No one except for the judge himself is under a stricter obligation to see that every defendant receives a fair trial, a trial in accordance with the law, which means the law as laid down by the duly constituted authorities, and not as the prosecuting attorney may think it ought to be. Neimeyer v. Commonwealth, Ky., 533 S.W.2d 218, 222 (1976) [My emphasis added].

The words of the Commonwealth's Attorney have meaning to a jury beyond the ordinary words of a mere attorney. His "mantle of power and respect" give his words indelible characteristics. Therefore, this Court must continue to scrutinize and condemn improper actions of the prosecutor whether or not the error is preserved for appellate review.

Appellant also directs this Court's attention to one other persuasive legal basis for reviewing this error and granting the requested relief - the failure of the trial judge to act to preclude improper and unethical argument.

Since the prosecutor's improper comments were made to the jury in closing argument, it is beyond doubt that the trial judge heard the prejudicial remarks. Nevertheless, the transcript of evidence establishes that the trial judge took no action to correct the error created by the prosecutor's highly improper and inflammatory argument. In this type of situation, the trial judge has a sua sponte obligation to act to prevent the jury from placing any reliance on the prosecutor's unethical remarks. The Standards Relating to the Function of the Trial Judge note that the trial judge has an independent responsibility to halt this type of improper argument.

In Standard 5.10 and its accompanying Commentary the trial judge's independent obligation to act to purge the error of improper closing argument is recognized and elevated to a judicial duty necessary to guarantee a fair trial. In view of

the trial judge's sua sponte duty in the event of such prosecutorial misconduct, it is obvious that no defense objection need be made to place the error before the trial judge. Accordingly, the trial judge's failure to exercise his judicial responsibility in the face of the prosecutor's patently improper and prejudicial argument is preserved for appellate review even though no objection was lodged by trial defense counsel.

In view of the fact that the prosecutor's closing argument was replete with improper and prejudicial comments, the possibility and, indeed, the probability of prejudicial impact is increased to the point of certainty. See Rodriguez v. Sandoval, 409 F.2d 529 (1st Cir. 1969). Since this was not an isolated remark by the prosecuting attorney, but instead a pattern of argument, the existence of prejudice to Appellant is beyond dispute. When the prosecutor has "pursued a course of action deliberately calculated to cause the jury's decision to be influenced by improper factors, it is inescapable that the prosecutor has "overstepped the bounds of propriety and fairness." Accordingly, the conviction must be reversed. Faulkner v. Commonwealth, Ky., 423 S.W.2d 245 (1968).

Where, as in the case at bar, it clearly appears that "the argument has gone beyond bounds necessary to fasten guilt and has taken undue advantage of the accused," this Court has always reversed on the ground of improper argument. Webb v. Commonwealth, Ky., 451 S.W.2d 397, 398-399 (1970).

Therefore due to the improper, prejudicial, and unfair comments of the prosecutor during closing argument and the resulting high probability of its influence on the jury, Appellant submits that this Court reverse the conviction.

X.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY ADMITTING INTO EVIDENCE, OVER DEFENSE OBJECTION, PHOTOGRAPHS OF THE DECEASED WHICH WERE INFLAMMATORY AND WITHOUT SIGNIFICANT PROBATIVE VALUE.

State Trooper Paul Maynard testified that on the morning of July 12, 1971, he went to the residence of Gladys Deskins (T.E., Vol. II, p. 173), and made photographs of the scene (T.E., Vol. II, p. 174). When Trooper Maynard began to describe the first of five photographs of the victim, Appellant's trial counsel interposed an objection (T.E., Vol. II, p. 183). At this point, the trial judge held a hearing on the admissibility of the photographs out of the presence of the jury (Id.).

During this hearing, Appellant's trial counsel renewed his objection to the introduction of the photographs on the grounds "that these photographs serve no legitimate purpose in the trial of this case because they tend only to shock and inflame the jury thereby prejudicing the jury against the defendant" (T.E., Vol. II, p. 184). Furthermore, trial counsel stipulated that Gladys Deskins was murdered; therefore, he stated the pictures became "that much more unnecessary" (Id.). Although the trial judge was "inclined to agree" that the photographs would inflame the jury, he overruled trial counsel's objection on the basis of this Court's pronouncement in Deskins v. Commonwealth, Ky., 512 S.W.2d 520 (1974). The trial judge in making this ruling erroneously assumed that the exact same photographs were before the trial court as were before this Court in the Deskins case (T.E., Vol. II, p. 185).

At this point, the jury returned to the courtroom, and the examination of Trooper Maynard continued. He testified that the first of the five photographs of the deceased

(Exhibit 11) showed Mrs. Deskins lying "diagonally across the bed with her head between the headboard of the bed and the corner of the room" (Id.); the second photograph (Exhibit 12) was a close-up of the Exhibit 11 and showed "the portion of her body from the waist up" (T.E., Vol. II, p. 186); the third photograph (Exhibit 13) was taken at the funeral home and showed "what appeared to be a wound between Mrs. Deskins' thumb and index finger on the right hand" (T.E., Vol. II, p. 187); the fourth photograph of the deceased (Exhibit 14) was also taken at the funeral home and depicted the stab wounds on the back of Mrs. Deskins (Id.); the last photograph (Exhibit 15) showed "a wound to Mrs. Deskins' head" (T.E., Vol. II, p. 188).

When the prosecutor moved for the admission of these photographs, Appellant's defense counsel renewed his objection and also moved for a mistrial (T.E., Vol. II, pp. 188-189). The trial court overruled both the objection and motion (T.E., Vol. II, p. 189), and allowed the prosecutor to pass the photographs to the jury (Id.).

This Court in Poe v. Commonwealth, Ky., 301 S.W.2d 900 (1957), said that:

> . . . The introduction of gruesome photographs, bloody clothing, and the like is almost inevitably accompanied by the risk of inflaming the minds of the jurors to the prejudice of the accused. Where necessary to prove a contested relevant fact, their probative value is usually held to outweigh any possible prejudicial effect they might have. But where the facts sought to be proved by the possibly prejudicial evidence are admitted by the defense, it is difficult to understand what probative value (other than as cumulative evidence) such evidence might have. . . . Id., at 902-903.

It is still difficult to ascertain, in the case sub judice, the purpose for which the photographs of the deceased were introduced since Appellant's trial counsel

stipulated that Mrs. Deskins was murdered. Under such circumstances, these photographs were unnecessary, irrelevant, and calculated to inflame the jury.

In Salisbury v. Commonwealth, Ky., 417 S.W.2d 244 (1967), this Court explained:

> . . . The rule prohibiting the exhibition of inflammatory evidence to a jury does not preclude the revelation of the true facts surrounding the commission of a crime when these facts are relevant and necessary. . . . Id., at 246.

Since Salisbury is a reiteration of the Poe prerequisite for admission of gruesome photographic depictions of homicide victims and scenes, Salisbury's requirement that the revelation of facts be necessary implies that such photographs must be necessary to prove a fact in issue. It would seem logical to conclude that since proof as to cause of death and its probative incidents were not contested, the Salisbury admission test could not have been met in the instant case.

It must be admitted that this Court in Deskins, supra, held that the photographs before it were competent evidence. In so doing, this Court stated:

> . . . All the photographs were taken at the scene of the crime and revealed the nature of the wounds and the position of the decedent at the time she was found by the officers . . . . Id., at 527. [My emphasis added.]

However, the trial judge was in error to assume that the above-cited case controlled the admissibility of photographs in the case at bar.

Unlike the photographs facing this Court in Deskins, the prosecutor in the case at bar introduced one additional photograph. Exhibit 15, which was not before this Court in Deskins, showed the front portion of the victim's body from the waist up. It also depicted the wound to her head in gory detail, and clearly inflammed the jury against Appellant.

Further, two of the photographs (Exhibits 13 and 14) were not taken "at the scene of the crime," but rather, at the funeral home.

This Court in Napier v. Commonwealth, Ky., 426 S.W.2d 121 (1968), stated that the depiction of gruesome crime scenes cannot be excluded merely because of their gory nature as long as they accurately depict the body of the decedent in the condition or place in which found.

This principle was reiterated in Moore v. Commonwealth, Ky., 489 S.W.2d 516 (1973). In the cited case this Court explained:

> . . . We believe the photographs in this instance were without question the best evidence of the scene of the interior of the bathroom where the body was found and that it was most relevant to prove the conditions surrounding the body at the scene. . . . While it is true that a view of these photographs has some effect to shock, it is nevertheless true that they did serve to give the jury better perspective and understanding of the scene. . . . Id., at 518.

Applying the same criterion to the photographs taken at the funeral home, it is impossible to find any probative value served by this introduction. Consequently, these photographs could not have facilitated the jury's better understanding and perspective of the scene of the crime, rather they served as an inflammatory influence on the normal fact-finding process of the jury.

Because the five photographs had no probative value, their introduction into evidence served only to inflame and prejudice the minds of the jurors against the Appellant. Under this onerous burden, the jury could not have rendered a fair and impartial verdict. The prejudice inflicted by the trial court in admitting such evidence can only be purged by granting Appellant a reversal of his conviction.

XI.

THE CUMULATIVE EFFECT OF THE PRECEDING TEN ERRORS SUBSTANTIALLY PREJUDICED APPELLANT'S TRIAL AND DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Assuming arguendo that this Court declines to hold any individual, assigned error sufficient to require the reversal of Appellant's conviction, Appellant submits that the cumulative effect of the ten preceding errors requires that the conviction below be set aside and a new trial ordered. As a result of all ten errors, Appellant's right to a fair trial was subverted and due process denied.

Appellant was convicted without even having been given his Sixth Amendment rights to the Constitution. He was denied the compulsory process of obtaining witnesses in his behalf; he was denied his right of alternative counsel; he was denied his right to a speedy trial. In short, Appellant was denied his very right to present a defense as we know it.

In addition to allowing the prosecution to erroneously introduce into evidence the prior inconsistent statements of witnesses, the trial court also permitted the prosecution to introduce into evidence photographs of the deceased. Finally, the trial court permitted the prosecution to make a prejudicial closing argument.

This Court in Peters v. Commonwealth, Ky., 477 S.W.2d 154 (1972), recognized that even though no error alone may require reversal, the cumulative effect of a number of assignments of error may mandate a new trial:

> In resolving the question whether the conviction as well as the penalty should be reversed, we take into account the fact that the evidence was circumstantial although strongly indicative of guilt. We also consider that a number of trial errors were made, neither of which taken alone

> would have justified a reversal; but the accumulation of these errors inclines this court to also reverse the conviction with directions to grant appellant a full, new trial. Id., at 158.

Insisting that the requirements of "fundamental fairness" must be observed in all criminal trials, the Supreme Court in Chessman v. Teets, 354 U.S. 156, 77 S.Ct. 1127, L.Ed.2d 1253 (1957) stated:

> . . . On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in questions. . . Id., 77 S.Ct. at 1132.

Accordingly, on the basis of the cumulative effect of the assigned errors, this Court must reverse Appellant's conviction and order a new trial.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the judgment of the lower court be reversed.

Respectfully submitted,

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